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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 577.

MOYLAN C. FOX, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SARAH M. McKIBBIN, DECEASED, APPELLANT,

vs.

HENRY C. HAARSTICK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 21, 1893.

(15,395.)

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a Supreme Court of Utah.

File No., 340.

HENRY C. HAARSTICK, Plaintiff and Respondent,
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Defendant and Repellant.

Transcript.

Marked filed in the supreme court Dec. 24th, 1892, at Salt Lake City, Utah.

JAS. P. BACHE, *Clerk*,
By JOHN C. SHIPP, *Dep. Clk.*

1 In the District Court of the Third Judicial District of Utah, Salt Lake Co.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Defendant. } Complaint.

The said plaintiff complains of the defendant and alleges—

That the said defendant, Moyland C. Fox, is the executor, duly qualified and acting, of the last will and testament of Sarah M. McKibbin, deceased, duly appointed by the probate court of Salt Lake county, where the said deceased resided at the time of her death.

That the said deceased, Sarah M. McKibbin, on or about the 1st day of March, 1890, contracted in writing by correspondence with this plaintiff, whereby and in consideration of the mutual promises hereafter stated and stated in said correspondence she, the said Sarah M. McKibbin, deceased, contracted to sell and deliver within forty days after said date fourteen hundred and fourteen shares of the capital stock of a corporation known as the St. Louis & Mississippi Valley Transportation Co., a corporation organized under the laws of the State of Missouri, for the gross sum of ninety-two thousand five hundred dollars, and the said plaintiff did in writing, by the said correspondence aforesaid, then and there accept the
2 said offer to sell the said stock and promised to pay for the same the said sum of $92,500 upon the delivery of the said stock, and the said contract on the part of said deceased, Sarah M. McKibbin, was in consideration of the said promise to pay on the part of this plaintiff.

That before the time of the completion of said contract arrived the said Sarah M. McKibbin died, to wit, on or about the 5th day of March, 1890, and the said executor now refuses and declines to perform said contract and has so refused from the date of his appointment as executor of the said deceased and declines to deliver the said stock and to carry out and fulfill the said contract.

That the plaintiff has been ready and willing and is now ready and willing to pay the said sum of $92,500 for the said stock upon the delivery thereof, but the said executor still declines and refuses to accept the same.

That the said stock at the time when the same should have been delivered was of the value of $85 per share, to wit, of the gross valuation or sum of $120,190; that there has been declared upon the same during the said period a dividend amounting to the gross sum of $8,484, making a total value of $128,674; that the enhanced value of the said stock, between the date of the said contract, between the price of purchase-money and the value thereof at the date when same should have been delivered is $36,174.

Plaintiff further alleges that on the 30th day of October, 1890, he presented a claim in writing, pursuant to the statute, demanding payment of the said sum, to Moylan C. Fox, executor of the said deceased, and that on same day said Fox rejected said
3 claim.

Wherefore plaintiff demands judgment for the said sum of $36,174, for costs of suit, and for such other and further relief as may be proper.

ARTHUR BROWN,
F. S. RICHARDS,
Attorneys for Plaintiff.

Indorsed: = 8823. Original. Third district court. Henry G. Haarstick *vs.* M. C. Fox, executor est. of Sarah M. McKibbin. Complaint. Filed Oct. 30, 1890. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Issued October 30, 1890. F. S. Richards and Arthur Brown, attorneys for pl'ff.

4 UTAH TERRITORY, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, as Executor of the Estate of Sarah M. McKibbin, Deceased, Defendant.

For an amended answer to the complaint the defendant on information and belief denies that the deceased, Sarah M. McKibbin, on or about the 1st day of March, 1890, or at any time, contracted, in writing or otherwise, with the plaintiff whereby or in consideration of mutual promises referred to or on any consideration the said Sarah M. McKibbin, deceased, contracted to sell or deliver, within the time mentioned or at all, fourteen hundred and fourteen or any number of shares of the capital stock of the corporation named for the gross sum of ninety-two thousand five hundred dollars or for any sum; and on information and belief defendant denies that the plaintiff, in writing or by said correspondence or otherwise or then or there or at all, accepted said or any offer to sell said or

any stock or promised to pay for the same the said sum of ninety-two thousand five hundred dollars or any sum upon the delivery of said or any stock or otherwise, and denies that the said alleged or any contract on the part of said Sarah M. McKibbin, deceased, was in consideration of the alleged promise to pay on the part of the plaintiff or on any other consideration whatever; and
5 the defendant on information and belief denies that he now refuses or declines or at any time has refused or declined to perform said or any contract or declines or has declined to deliver said or any stock or to carry out or fulfill said or any contract.

And the defendant alleges that he has no information or belief sufficient to enable him to either set forth the exact and specific facts affirmatively or to answer the allegations of the complaint as to the market value of said stock or as to the amount of its enhanced value, and on that ground defendant denies the allegations of the complaint as to those matters, and on information and belief defendant alleges that the plaintiff agreed to act as the agent of deceased in selling said stock, and that there never was any contract of sale of said or any stock made between the plaintiff and said deceased, and that the plaintiff never sold said or any stock for said deceased.

And for a second and separate defense the defendant alleges that prior to the date of the alleged contract mentioned in the complaint the plaintiff agreed with said Sarah M. McKibbin to act as her agent in the matter of the sale and disposal of said shares of said stock for her, and represented to her by writing that the said company had lately sustained large losses, and that the shares aforesaid had just depreciated 40 per cent. in value and were not worth the value she placed on them, and undertook to sell and dispose of them for her for $92,500; that in fact said company was in extra prosperous condition and had lately acquired a large cash reserve in its treasury and was about to declare and pay a large dividend on said
6 shares of stock, and that the shares had an increased value by reason of that fact and had not depreciated in value; that plaintiff was then and is now president of said company and knew the foregoing facts, and said deceased did not know said facts, and, so knowing, the plaintiff wilfully and fraudulently concealed said facts from the deceased and induced deceased to believe that she was about to make an advantageous sale, and any and all action taken and communication had by deceased with plaintiff was induced by and based upon the belief on her part brought to her mind as aforesaid.

That said extraordinary dividend was, soon after March 1, 1890, declared and paid on the shares of stock in said company except on said 1,414 shares, and by connivance with and at the instigation of plaintiff, as its president, said company has refused to pay and has not paid the dividend aforesaid on said 1,414 shares. Wherefore defendant prays judgment that plaintiff take nothing, and for costs of suit.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Def't.

Indorsed: Original, 8823. H. A. Haarstick, pl'ff, *vs.* Moylan C. Fox, ex., def't. Amended answer proposed. 3rd dist. court. Filed Feb. 28, 1891. Henry G. McMillan, clerk; Geo. D. Loomis, deputy. Copy received by us February 28, 1891. Arthur Brown, pl'ff's atto'ys. Filed March 30, 1891. Henry G. McMillan, clerk.

7 In the District Court of the Third Judicial District of Utah, Salt Lake County.

HENRY HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Defendant.
} Findings of Fact and Conclusions of Law.

This cause having been called regularly for trial before the court (a jury trial having been expressly waived by the respective parties), Arthur Brown and F. S. Richards appeared as attorneys for the plaintiff and John A. Marshall and William H. Dickson appeared as attorneys for the defendant; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

1. That the defendant, Moylan C. Fox, is the executor, duly qualified and acting, of the last will and testament of Sarah M. McKibbin, deceased.

2. That by written correspondence between Sarah M. McKibbin, deceased, and the plaintiff, dated February 25th, 1890, and March 1, 1890, the said Sarah M. McKibbin, deceased, contracted to sell and deliver to the plaintiff within forty days after said date 1,414 shares of the capital stock of the St. Louis and Mississippi Transportation Company, a corporation organized under the laws of the State of Missouri, for the sum of ninety-two thousand five
8 hundred dollars.

3. That before the time of the completion of said contract arrived, to wit, on the 5th day of March, 1890, the said Sarah M. McKibbin died, and the said executor then refused and ever since has refused and declined to deliver said stock and to carry out and fulfill the contract.

4. That the plaintiff has been ready and willing to pay the said sum of ninety-two thousand five hundred dollars for the said stock upon the delivery thereof, but the said executor still refuses and declines to accept the same.

5. That the said stock, at the time when the same should have been delivered, to wit, on or about the 10th day of April, 1890, was of the value of one hundred and four thousand five hundred dollars, and that the plaintiff was damaged by reason of the defendant's failure to deliver the said stock and fulfill the said contract in the sum of twelve thousand dollars, with interest thereon, at the rate of eight per cent. per annum, from the 10th day of April, 1890,

amounting at this date to one thousand four — and eighty-five dollars and making the plaintiff's damage in all thirteen thousand four hundred and eighty-five dollars.

6. That on the 30th day of October, 1890, the plaintiff presented a claim in writing, pursuant to the statute in such case made and provided, demanding the payment of the sum of thirty-six thousand one hundred and seventy-four dollars damages to Moylan C. Fox, executor of said Sarah M. McKibbin, deceased, and that on said day the said executor rejected said claim.

9 As conclusions of law from the foregoing facts, the court now hereby finds and decides—

That the plaintiff is entitled to have and recover of and from the defendant the sum of thirteen thousand four hundred and eighty-five dollars, with interest thereon from this date until paid, at the rate of eight per cent. per annum, and costs of suit, and judgment is hereby ordered to be entered accordingly.

C. S. ZANE, *Judge.*

October, 1891.

Attest:
March 26, 1892.

HENRY G. McMILLAN, *Clerk.*

Indorsed: ≠8823. Third district court, Utah. Henry C. Haarstick *vs.* Moylan C. Fox, executor. Findings of fact, etc. Filed March 26, 1892. Henry G. McMillan, clerk.

In the District Court of the Third Judicial District of Utah, Salt Lake County.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Defendant. } Judgment.

This cause came on regularly for trial on the 26th day of October, 1891, Arthur Brown and F. S. Richards appearing as counsel for the plaintiff and John A. Marshall and W. H. Dickson for the defendant. A trial by jury having been expressly waived by

10 *by* the counsel for the respective parties, the cause was tried before the court sitting without a jury; whereupon witnesses were examined and testimony introduced on the part of the plaintiff and also on the part of the defendant, and, the evidence being closed, the case was submitted to the court for its decision, and after due deliberation thereon the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that Henry C. Haarstick, the plaintiff, do have and recover of and from Moylan C. Fox, executor of the estate of Sarah M. McKibbin, deceased, the sum of thirteen thousand

four hundred and eighty-five dollars, with interest thereon, at the rate of eight per cent. per annum, from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of — dollars.

C. S. ZANE, *Judge.*

March 26, 1892.

Attest: HENRY G. McMILLAN, *Clerk.*

Indorsed: ≠ 8823. Third district court, Utah. Henry C. Haarstick *vs.* Moylan C. Fox, ex. Judgment. Filed March 26, 1892. Henry G. McMillan, clerk.

11 UTAH TERRITORY, *Salt Lake County,* } *ss:*

In the District Court of the Third Judicial District.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, as Executor of the Last Will and Testament of Sarah M. McKibbin, Deceased, Defendant.

To the plaintiff and to his attorneys, Arthur Brown and E. S. Richards:

You are notified that the defendant intends to and will move the court for a new trial of this action on the following grounds, namely:

1. Insufficiency of the evidence to justify the findings and each of them.
2. That the findings and each of them are against law.
3. Error in law occurring at the trial and excepted to by the defendant.

The motion will be made upon the records and files herein and on a statement of the case to be hereafter prepared and served on you.

Dated April 4th, 1892.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendant.

Indorsed: ≠ 8823. Service of copy admitted 4, 4, '92. Arthur Brown, per H. P. H., att'ys pl'ff.

12 UTAH TERRITORY, } ss:
Salt Lake County. }

In the District Court of the Third Judicial District.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, as Executor of the Last Will and Testament of Sarah M. McKibbin, Deceased, Defendant.

Statement on Motion for New Trial.

This cause coming on regularly for trial, the plaintiff appeared by his attorneys, Arthur Brown and S. F. Richards, and the defendant by his attorneys, Bennett, Marshall & Bradley and W. H. Dickson; and thereupon the following proceedings were had:

The plaintiff, to maintain the issues on his part, introduced the deposition of HENRY C. HAARSTICK, the plaintiff, taken in pursuance of stipulation. Said plaintiff testified as follows:

I am the plaintiff in this action and am the president of the St. Louis and Mississippi Valley Transportation Company.

I reside in St. Louis, State of Missouri.

I was acquainted with Sarah M. McKibbin, deceased, in her lifetime, and had been acquainted with her for a period of about eighteen years. I knew her when she was the wife of Joab Lawrence and subsequently when she was the wife of Mr. McKibbin.

I had a transaction with said Sarah M. McKibbin with reference to her stock in the St. Louis and Mississippi Valley Trans-
13 portation Company, which was by correspondence.

The letters with reference thereto and all of the letters which passed between Sarah M. McKibbin and myself are as follows. The letters purporting to be signed by her and received by me in due course of mail are in her handwriting, and those purporting to be signed by me were written by me and by me mailed to her:

DEC. 31, '89.

Buckingham hotel, 50th street & 5th avenue, New York city.

Mr. Haarstick, pres. Miss. Valley Trans. Co.

DEAR SIR: As I think I may wish to dispose of the Miss. Valley Trans. stock, will you be so kind as to inform me if there is a market for such stock and what the market value, a- much oblige,

Respt. yours, SARAH M. McKIBBIN,
Formerly Mrs. Joab Lawrence.

JAN'Y 2D, '90.

DEAR MRS. McKIBBIN: I am in receipt of your letter of 31st ult., in which you state you would like to sell your stock in our company and asking if there was a market for it.

In reply I would state that it might take 30 or 60 days to place

so large a block of the stock, but I think I could place it in
14 that time at from $65 to $70 per share. If you conclude to dispose of your interest and will send the stock to me, I will be pleased to sell it for you.

Very truly yours, HENRY C. HAARSTICK.

To Mrs. Sarah M. McKibbin, Buckingham hotel, N. Y.

NEW YORK, *Jan. 10th*, 1890.

Mr. H. C. Haarstick.

DEAR SIR: Your kind favor received. The Capt. always quoted the stock at par. I am in no hurry to dispose of it and may conclude not to do so. Will be in St. Louis some time before the 20th, when I shall take the pleasure of calling on you.

Resp't'y yours, SARAH M. McKIBBIN.

SALT LAKE CITY, UTAH, *January 27th*, 1890.

Mr. H. C. Haarstick.

DEAR SIR: I shall forward by mail today photograph of paper held by Mr. Whitney; also another signature. Would like you to let me know if you think both them written by the same person and if you think them both written by Mr. Lawrence. I would also like to inquire if you have any experts on signatures in your city and what is the cost of having signatures tested. How many would they require to make the test?

Upon reflection I think the Miss. Valley stock worth more
15 than the price you named. Let me know if that is the very best you can do.

Kind regards from,

Yours resp't'y, SARAH M. McKIBBIN.

FEBRUARY 5, '90.

DEAR MRS. McKIBBIN: I received your letter of 27 ult. some days ago, but the photo did not reach me until yesterday p. m. I have examined the latter carefully and would not hesitate to say that in my opinion Capt. Lawrence wrote the original. The signature which you sent at the same time on a slip of paper I do not recognize as the Captain's signature. He may have written it, but not as his signature.

Now, as to an expert for testing or proving signatures we have in our city one of the best in the U. S. I asked him for terms and enclose you his answer. I know Mr. Wieschon personally, and in talking with him asked him if he could decide on a photograph copy in case he was furnished with a number of letters that were original. He replied that any expert of reputation would refuse to look at a photo and give an opinion; it could only be had on the original.

With regard to our barge stock all I can say is that the figure I mentioned is about as much as you could realize, in my opinion. We are beginning to feel a new all rail—Kansas City to N. O.—

the competition of which, via Memphis, I fear will eventually injure us badly.

Very truly yours, HENRY C. HAARSTICK.

To Sarah M. McKibbin, Salt Lake City, Utah.

16 SALT LAKE CITY, *February 1st*, 1890.

Mr. H. C. Haarstick.

DEAR SIR: I write you some days ago; also mailed package containing photo of paper that Mr. Whitney holds. You have, I suppose, signatures of Mr. Lawrence to make comparisons. Will you be so kind as to inform me if you have any signatures of Mr. L. bearing date of '72 or from '72 to '75; also can you give me any information in regard to the banks that Mr. Lawrence ever did business with in St. Louis. Have you a Phœnix bank in St. Louis; and, if so, is it a safe deposit, and how long has it been established?

I am led to believe that Mr. L. has a safe-deposit box somewhere, which I have as yet been unable to find. Mr. L. nine years ago gave me a key to take care of, not saying what key it was. It had gone out of my mind until after his death. I opened the paper that the key was wrapped in, but found nothing but the key and number 394 written on the inside of paper. The key is certainly a safe-deposit key. Mr. L. at one time told Mr. Dooly, agent of Wells-Fargo bank here, that he had a safe-deposit box in New York city. I have made inquiry at all the safe deposits in New York, but fail to locate the key. The thought came to me perhaps he may have deposited in St. Louis.

Hoping I am not intruding to- much on your valuable time, with kind regards,

Resp't'y yours, SARAH M. McKIBBIN.

17 FEB'Y 7TH, '90.

Mrs. Sarah M. McKibbin, Salt Lake City, Utah.

DEAR MADAM: Since writing you a few days ago I am in receipt of your letter dated 1st inst., and note fully all the information you ask for. Answering, would state that we cannot find writing from Mr. Lawrence in the years 1872 to 1875; the business we had at that time was done through Mr. Lackey; even the transportation stock was in the name of the latter. We find two signatures of Mr. Lawrence for dividends paid him in 1881 & '2.

I think Mr. Lawrence kept a box in the State Savings Association of this city, but whether Mr. Lackey had the key or Mr. L. I cannot say; the bank is not one that has a safe-deposit department, but all banks at that time would keep tin boxes for their customers in their vault.

We had a safe deposit Co. in St. Louis as early as 1872; the name is the "St. Louis Safe Deposit Co." You might write to the secretary, asking him if Mr. L. had ever rented a box. I, however, doubt if he ever had one there. We have no other safe deposit Co. except the "Missouri Safe Dep. Co.," only 3 years old. There is no

Phœnix bank in this city, nor has there ever been, to my knowledge.

In my last I wrote you that it was my opinion that M-. L. wrote and signed the agreement of which you sent me a photo. I omitted to say that I am fully convinced that he also settled with Mr. Whitney, and that you will find a receipt amongst his papers, for
18 I never knew him to leave a matter of business open for any length of time; he was always very prompt in his engagements, and undoubtedly has settled with Mr. Whitney, if you can only prove it.

Always ready to assist you in any way I can.

Yours truly, HENRY C. HAARSTICK.

SALT LAKE CITY, *February 10th*, '90.

Mr. H. C. Haarstick.

DEAR SIR: Your two favors received and many thanks for information given. I have concluded to sell Miss. Valley Trans. stock for $100,000 (one hundred thousand dollars). If you accept, how long will it take to complete the sale?

In regard to testing the signature, I shall no doubt be compelled to bring the party here when the proper time arrives or when the question comes up.

Kind regards.

From yours resp't'y, SARAH M. McKIBBIN.

SALT LAKE CITY, *February 12th*, '90.

Mr. H. C. Haarstick.

DEAR SIR: In reading over your last favor and noting where you write you think Capt. Lawrence had a box at the State Savings Association, if it is not asking too much, will you please inquire
19 at the bank if he has a box or package there. We are so anxious to find something in reference to this lawsuit, and I feel sure could I locate the key I have I would find something of importance.

Resp't'y yours, SARA M. McKIBBIN.

FEBRUARY 19, '90.

DEAR MRS. McKIBBIN: On my return from New Orleans, where I went some 12 days ago, I find your letter dated 10th inst. and saying you had concluded to sell your St. L. & Miss. Valley T. Co. stock for $100,000 and ask me how long it would take to complete the sale.

Replying to same, will say a week ago yesterday we met with a terrible loss at Memphis. One of largest boats, the "Port Eads," struck the pier of the new railroad bridge now building there, going into a thousand pieces and, of course, being a total loss. In addition, one barge was sunk, beside another badly hurt. The tow was caught and landed, but it may cost us considerable for salvage, and as we carry our own insurance it may take all of $75,000 to make good the loss. This is equal to 4 % on our stock, and in addition

to this it will not be very easy now to dispose of it readily, as parties who might have bought will be fearful on account of accidents in the future.

If you will sell the 1,414 shares belonging to the estate for $92,500, I will undertake to dispose of them inside of 60 days, but must request an answer by return mail; also, if you will sell, would request that you send the stock, properly endorsed, by express to me at same time.

Very truly yours, HENRY C. HAARSTICK.

SALT LAKE CITY, *Feb. 25th*, 1890.

Mr. H. C. Haarstick.

DEAR SIR: Your favor, making offer of $92,500 (ninety-two thousand and five hundred dollars) for the 1,414 shares of Miss. Valley Trans. stock, received, and I say in reply that I accept of your offer, but cannot deliver the stock under forty days. The probate laws here are such that I must wait until I get possession of the stock; otherwise it would have to be sold here at public auction. I am having trouble with the Whitney case, which has prevented my being already in possession of the estate, which I should have been three months ago, and the estate is already injured to the amount of a good many thousand dollars. Hoping this will meet your views in regard to stock,

With kind regards, resp't'y yours,

SARAH M. McKIBBIN.

MARCH 1ST, '90.

DEAR MRS. McKIBBIN: I am in due receipt of your letter dated 25th February, accepting my offer of $92,500, ninety-two thousand five hundred dollars, for the 1,414 shares of St. Louis — Miss. Valley Transportation Co. stock belonging to the estate of Joab Lawrence, but that you could not deliver it for 40 days from date of your letter. This is perfectly satisfactory to me. When you obtain possession you can draw on me at sight for the amount, with certificates of stock attached or, if you prefer, I will deposit the amount in any one of our banks you may designate on delivery of the stock to me. Since my last letter to you I have called upon the pres't of the old State Savings Institution, Mr. Parsons, and asked him if they had a tin box for Capt. Lawrence. They say not. I also called at the National Bank of Commerce and the St. Louis Safe Deposit Co., but cannot find a trace of anything at either place.

I know an old friend of John Lackey's, a Mr. Sands. As soon as I find him I will interview him and see if he cannot give us some information, but, judging by my investigation, I am of opinion that Capt. Lawrence held his papers, etc., elsewhere than in this city ever since the death of Jno. A. Lackey.

Pleased to serve you at any time, and trusting you will call upon me for any information I may have, I remain,

Yours very truly, HENRY C. HAARSTICK.

To Sarah M. McKibbin, Salt Lake City.

The foregoing are all the letters that passed between Sarah M. McKibbin and myself, and about the 4th of March, 1890, I received a telegram from Moylan C. Fox stating that Mrs. McKibbin passed peacefully away this morning at 8.40.

22 The value of the stock of the St. Louis and Mississippi Valley Transportation Company on the tenth of April, 1890, was about eighty dollars per share. The corporation was organized under the laws of the State of Missouri in 1881, and at the time above stated there was a market value for the stock which was about eighty dollars per share.

This stock was only known in the St. Louis market, where it was bought and sold. Since the 10th of April, 1890, the stock has sold as high as eighty-five dollars per share and was worth that sum at the time of the commencement of this action. Owing to the failure of crops in the fall of 1890, the stock has declined and is not worth now over eighty dollars per share.

This stock has paid dividends on a par value of $100.00 per share, as follows:

On July 15th, 1882, 5 per cent.
January 6th, 1883, 3 per cent.
July 2nd, 1883, 3 per cent.
July 10th, 1884, 6 per cent.
July 1st, 1885, 4 per cent.
July 1st, 1886, 4 per cent.
June 1st, 1887, 5 per cent.
June 20th, 1888, 4 per cent.
June 29th, 1889, 5 per cent.
June 21st, 1890, 6 per cent.

The letter heretofore copied and dated Buckingham hotel, in New York city, was received by me on the 2d or 3d of January, 1890. The words in pencil, Dec. 31, 1889, on that letter are in my handwriting and is the date of the New York postmark upon the envelope which contained the letter. The letter is in the handwriting of Mrs. McKibbin.

I knew Joab Lawrence from the year 1870 until the date
23 of his death, and had business relations with Lawrence and have at times loaned him money, taking his Mississippi Valley Transportation stock as collateral. I never acted for or on his behalf or as agent of said Lawrence, so far as I now recollect, nor was I ever requested by him to so act. I think Lawrence died in 1889. The stock before referred to as belonging to Sarah M. McKibbin I was informed belonged to her by virtue of a devise to her from Joab Lawrence. The stock stood on the books of the St. Louis and Mississippi Valley Transportation Company in the name of Joab Lawrence and did not stand in the name of Sarah M. McKibbin at any time. I never acted for, on behalf of, or as the agent of Sarah M. McKibbin, either personally or in her representative capacity, except as requested by her letters to me from Salt Lake City, dated February 1st, February 12th, 1890, heretofore attached, but I did make the inquiries and investigations in such letters requested. I have been the president of the St. Louis and Mississippi Valley Transportation Company

ever since its organization, in 1881, and during the period of my said correspondence with said Sarah M. McKibbin I was entirely familiar with the business condition of said company. I was so familiar with it during the entire year of 1890, and had ample opportunities to know the same by virtue of my position as president of the company, and I know the financial and business condition of said corporation for the months of January, February, and March, 1890.

About the month of January the financial condition of the company was good, the business was fair; for the month of
24 February the financial condition of the company continued to be good, but the company met with a heavy loss on the 10th by the sinking of the Port Eads. We met with an absolute loss of upwards of fifty thousand dollars, with a contingent liability for salvage and for saving and landing the barges in tow of the steamer Port Eads, which may have amounted to from twenty to thirty thousand dollars more.

For the month of March, 1890, the financial condition of the company was good and the business excellent, as we had all the freight we could carry at good rates and no accidents. The business continued to be large and profitable until the middle of August.

I never mailed to Sarah M. McKibbin the printed slip hereafter referred to in the testimony of Moylan C. Fox, nor did I ever mail a similar one to said Sarah M. McKibbin.

I heretofore stat*ing* the market value of the stock on the 10th of April, 1890. I arrived at such market value by what the stock had sold for previously, adding thereto the amount of money the company had thereafter made. I do not remember any sales at or about the dates April 8th, 9th, or 10th, 1890.

There are 19,287 shares of stock in the St. Louis and Mississippi Valley Transportation Company, and I own 4,500 shares of this stock, all of which stands in my own name.

On March 1st, 1890, I made a contract to sell 707 shares of the stock of said company for the sum of 46,250. This is the only sale or contract of sale of said stock which I made between February 18th, 1890, and April 10th, 1890. I have no personal
25 knowledge of any sales of said stock between those dates, except the one made by me, but I noticed on the books of the company that transfers of stock were made between the 5th of and the 7th of April, 1890, aggregating 390 shares.

The plaintiff next introduced in evidence the deposition of Austin R. Moore, taken in pursuance of stipulation.

The said AUSTIN R. MOORE testified as follows:

I am fifty-eight years of age and reside in St. Louis, Missouri, and I have been the treasurer of the St. Louis and Mississippi Valley Transportation Company since September, 1881.

I know the value of the stock of said corporation on the 10th of April, 1890, by reason of having a general knowledge of the busi-

ness of said corporation and the knowledge of the sale of a block of the stock on April 5th, 1890.

On the last-named date the stock sold for $73.50 per share. A fair range of value would be from $75 to $80 per share. In June, 1890, a dividend was paid on said stock of $6.00 per share.

The stock of said corporation was never listed on any stock exchange, to my knowledge. The value given by me of $73.50 per share was the market value. Sales were made at that price.

I know of no demand for stock on or about March 10th, 1890, and can only quote value from my general knowledge of the company's business, which would prompt me to place it at $65 to $70 per share. During February, 1890, the company met with serious losses, which was not limited to the direct loss in value of the property, but curtailed the facilities for handling the spring business. During
26 March, April, and May, 1890, there was a sudden increase in both the volume and remunerative character of the business, with every prospect of continuing through the summer months. I have known the plaintiff in this action twenty-three years. I am not related to him nor connected in business with him except as being an officer of the same corporation.

The plaintiff next introduced in evidence the deposition of GEORGE D. CAPEN, taken in pursuance of stipulation, who testified as follows:

I am fifty-two years of age and reside in St. Louis, Missouri, and am the president of the Lindell Street Railway Company; am also engaged in the insurance business. I have been president of the street railway company two years, and have been engaged in the insurance business twenty-seven years. I am acquainted with the St. Louis and Mississippi Valley Transportation Company, and from my general knowledge of the business affairs of that company I know the value of its stock on the 10th of April, 1890. It was then worth the sum of about eighty dollars to eighty-five dollars per share.

It has fluctuated in value from that time to this, and is now worth about seventy-five dollars per share. I am a director of the St. Louis and Mississippi Valley Transportation Company. Its stock was never listed on any stock exchange to my knowledge. I know of no sales about the time mentioned, namely, April 10th, 1890, but the company was doing a good business, with good prospects, and the amount I have stated as the value of the stock is simply my judgment of its worth.

In the month of February, 1890, the company met with a
27 marine disaster by way of losing barges and boats, which depreciated its stock, so that in my judgment it could not have been sold for above $60 to $65 per share; but later on, in April, May, and June, a fine business was done, and the stock of the company appreciated, so that it would readily sell for a considerable more than the figures named; and as the money market was easy during the latter months mentioned, it would be easy to dispose of

the company's stock at much higher figures than those quoted in February.

I have known plaintiff in this action for thirty years. I am not related to him nor connected in business with him, except as being an owner of stock in the St. Louis and Mississippi Valley Transportation Company.

As agent for various insurance companies I had business with the last-named corporation, insuring some of their towboats against fire only; otherwise I have no relations with the corporation, only as a director.

Plaintiff next introduced in evidence the deposition of L. A. COQUARD, taken in pursuance of stipulation, who testified as follows:

I am forty-three years of age and reside in St. Louis, Missouri, and do business there as a banker and broker. I know the value in St. Louis of the stock of the St. Louis and Mississippi Valley Transportation Company on the 10th day of April, 1890. I bought some of that stock on April 16th, 1890, and paid $75 per share for it, and I sold it August 19th, 1890, for $79.00 per share, after receiving six dollars per share dividend.

28 On the 10th day of April, 1890, its value was $75.00 per share; its value from then till April, 1891, was about $80.00 per share.

I do not hold any office in said transportation company. There was a dividend declared on said stock in the latter part of June, 1890, of $6 per share. There is very little trading in the stock named. It is held very close, and was never listed on any stock exchange to my knowledge. The value given by me was the market value of the stock on date named. I bought twenty shares of stock on April 16, 1890, at $75 per share. On March 10th, 1890, the market value of said stock was about $65 to $70 per share.

The company had met with a heavy loss at Memphis, on February 10th, 1890, which depressed the value of the stock.

I have known plaintiff in this section about 15 years and am not related to him nor connected in business with him. I am a stockholder of the St. Louis and Mississippi Valley Transportation Company.

MOYLAN C. FOX, a witness in behalf of defendant, testified as follows:

I am the defendant in this action, and I am the executor of the last will of Sarah M. McKibbin, deceased. I found some letters from plaintiff in this action to her, being the same letters heretofore introduced in evidence. The letter dated March 1st, 1890, in which Mr. Haarstick says: "I am in due receipt of your letter dated 25th February, accepting my offer of $92,500 for the 1,414 shares of St. Louis and Mississippi Valley Transpor-ation Company stock

29 belonging to the estate of Joab Lawrence, but that you cannot deliver them for 40 days from the date of your letter. This is perfectly satisfactory to me. When you obtain possession

you can draw on me at sight for the amount, with certificates of stock attached. If you prefer, I will deposit the amount in any one of our banks you may designate on delivery of the stock to me," &c., I found among the papers of Sarah M. McKibbin, deceased. This letter was mailed to her, but never received by her, and was still unopened when I found it. I opened it after her death. She died on the 5th of March, 1890, about half past eight o'clock in the morning. The ordinary time for a letter to come by mail from St. Louis, Missouri, to Salt Lake City is about three days. The letter referred to was mailed on the 1st day of March, 1890, and I would expect it to reach here on the 4th day of March. Fully 24 hours before her death Sarah M. McKibbin was absolutely unconscious. Before that time she was suffering very much and almost unconscious. After the death of Sarah M. McKibbin I also found a letter to her from Henry C. Haarstick, dated February 19, 1890, and the same letter heretofore introduced in evidence with that date. When I found it that letter was opened and contained a newspaper account of the accident to the Port Eads.

The slip from the newspaper now hande- me is the account that was contained in that letter—enclosed in the letter.

I have never received, nor has the estate of Sarah M. McKibbin, deceased, ever received, a dividend declared on the stock in June, 1890. I have attempted to obtain possession of the dividend and have correspondeud with Haarstick about it.

I do nor remember whether I got the letter dated March 1st, 1891, and written by plaintiff to Sarah M. McKibbin, from the post-office or whether the hotel clerk gave it to me. The post-office stamp on the env-lope containing that letter shows it was received in Salt Lake City March 4th, 1890, at seven a. m.

Defendant then introduced in evidence the newspaper slip referred to by the last witness in his testimony; which said newspaper slip was as follows:

Six lives lost—The towboat Port Eads sunk near Memphis, Tenn. She strikes a sunken bridge pier while towing a heavy fleet and instantly goes to pieces—The story of the casualty.

Special to the Republic.

MEMPHIS, TENN., *Feb.* 10.

At 7 o'clock this morning the towboat Port Eads, with a tow of seven barges, collided with pier No. 2, at the Memphis bridge works, and sunk in 70 feet of water three minutes after collision, carrying down with her 35 human beings, of whom six lost their lives.

The Port Eads was en route from St. Louis to New Orleans with six barges laden with grain and a fuel barge. She reached Island 40 Sunday night and laid up for the night, so as to pass the bridge in daylight and avoid the chances of just such a disaster as occurred. The Eads was in command of Capt. Nelson Davis, and Pilot Gus Heiner was at the wheel. The atmosphere was heavy and a dense smoke overhung the river, so that Heiner was not only un-

able to see the pier, but did not know that he was in the vicinity of the bridge, and did not see the pier until he was within a
31 few — of it. The fuel barge, which was next to the towboat *in* the larboard side, struck the pier with terrific force and, rebounding, crashed into the sides of the Port Eads. The latter then swung around and it, too, struck the pier and waterlogged in that short time from the hole made in her side by the first shock; she was ground between the pier and her barges in an incredibly short time; her cabin was filled with water almost instantaneously. Two minutes later she broke asunder, and all that remained of her was a vast pile of wreckage, that strewed the river, and the hurricane roof, which, with the Texas and pilot-house, became detached bodily and floated down the river.

The steamer Bryan was just leaving the West Memphis wharf and the tugs Welcome and Mayflower were at the bridge works, and at the first signal of distress they went to the scene, and at least a dozen skiffs were quickly manned and followed in the wake of the other craft. The effect of this prompt action was that though 35 people were thrown into the water, some were still struggling, others were hemmed in by floating pieces of wreck, and were in imminent danger of being crushed to death even if they should escape drowning, and still others were supporting themselves by whatever pieces of the wreck they were able to grasp; yet of all this number only six were lost, and all of these went down with the boat and did not again rise to the surface.

Nearly all of them had hair-breadths escapes, and most extraordinary coolness in the hour of dire peril was shown by a few. The escape of the captain, for instance, was little short of miraculous.
He left the deck when the boat struck and entering the cabin
32 opened the safe for the purpose of securing the money it contained. Before he could gain possession of it, however, the cabin filled with water, and with water running over his head he found his way out of the cabin and succeeded in reaching the top of a pile of wreckage, whence he was taken off.

The lost were John Murray, second engineer; John McDermott, second cook; Will Hickey, watchman; Tennie Jones, colored chambermaid; Jim Walker, colored; Bill Stewart, colored fireman.

The barge broke loose from the towboat as she sank and drifted down stream. They were overhauled by the steamer Bryan and the tug Welcome and tied up at President's island.

The Port Eads was built at Madison, Ind., in 1887, and cost in the neighborhood of $70,000. She carried only a fire-insurance policy and hence will be a total loss to her owners.

The News in St. Louis.

Officers of the company explain the cause of the disaster.—News of the loss of the Port Eads first received in St. Louis was of a very sensational character, the number of lives lost being placed at 30. Later news was to the effect that only one person, the chambermaid, had been drowned. Late last evening, however, a dispatch

received at the office of the company said six persons were missing. The dispatch said the accident occurred at 6 o'clock in the morning; that the boat went down and the six barges she was towing drifted away, but were picked up. The scene of the wreck was said to have been very exciting. As the boat sank the compression
33 of air consequent on the pressure of water blew the deck and cabin off and they floated down, bearing numbers of the crew; how many was not known. The hull sank in an instant, in 76 feet of water, and took a number of the crew; all but six, however, reported later. The names of the missing were given as follows:

William Stewart, fireman; Joseph Walker, fireman; John McDermott, second cook; William Hickey, watchman; John Murray, second engineer; Tennie Jacks (or Ora Moore), chambermaid. The body of McDermott was found and will be buried tomorrow at Memphis. Search is being made for the bodies of the others, but it is doubted if they will be found until the sunken vessel, in which they are probably caught, is raised, which will be done as soon as the machinery can be got there.

A. R. Moore, vice-president of the Mississippi Valley Transportation Company, said the loss would be about $65,000 on the boat and cargo. The company carries no insurance. At the time of the accident the water was high and the current swift. It covered the tops of the piers, which had only protruded a few feet above the surface of low water.

The steamboatmen, however, claim the accident was due to an unwarranted and autocratic assumption of power by the Secretary of War, through whose hands all bridge plans must pass.

"A little over a year since," said Vice-president Moore to a Republic representative, "the combined water-transporting inter-st asked Congress to prohibit any bridge at that point, but, if there must be one to meet the necessities of trade, they asked that
34 the navigation span be not less than 1,000 feet. Their wishes in the latter were respected by Congress, but the Secretary of War sent a board of survey from the United States engineer corps to investigate. They reported that no shorter span than 1,000 feet would answer. The Secretary, nevertheless, on his own responsibility, reduced the length to 760 feet."

"Is not that long enough?"

"No. When a steamer gets to drifting sideways with a tow it is the length, not the width, that counts. Besides, it is necessary to to have some latitude for drifting. This accident was the first, but it will be repeated. Should they manage to reduce the height of the spans from 75 to 65 feet, as they are trying to do now, the river will be simply impassable. We only accepted 75 feet as a compromise of the proposed reduction from 90 feet, the proper height. We learned then that the Secretary of War proposed reducing it from 75 to 65, and have just filed a vigorous protest. It is necessary to protect this great highway for traffic. The real trouble does not appear on the surface. If the railroads could block off this big river they would find relief from the competition that has been worrying

them. Almost the entire railroad interest is behind the blockade work."

The foregoing is all the testimony relating to or illustrating the assignments of error or tending to support the findings of fact in the particulars in which defendant hereafter specifies that said findings were not justified by the evidence.

The said action having been submitted to the court, the court,
35 on the 26th day of March, 1892, made and filed its findings of fact and decision in writing and entered its decree thereon. On the 4th day of April, 1892, the defendant duly filed in said court and served on the attorneys for plaintiff a notice of its intention to move for a new trial of said action, which was in the words and figures following:

(Title.)

To the plaintiff and to his attorneys, Arthur Brown and F. S. Richards:

You are notified that the defendant intends to and will move the court for a new trial of this action on the following grounds, namely:

1. Insufficiency of the evidence to justify the findings and each of them.

2. That the findings and each of them are against law.

3. Error in law occurring at the trial and excepted to by the defendant.

The motion will be made upon the records and files herein and on a statement of the case to be hereafter prepared and served on you.

Dated April 4th, 1892.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendant.

36 *Specification of Particulars in which the Evidence is Insufficient to Justify the Findings.*

1. The evidence is insufficient to justify the second finding of the trial court in the following particulars:

(*a.*) Because the evidence shows that said Sarah M. McKibbin never supposed that she was contracting to sell the stock to the plaintiff, but believed and had reason to believe that she was dealing with plaintiff as her agent and was simply authorizing her said agent to sell said stock to other parties at the best price obtainable, not less than the sum stated, and that the whole correspondence shows that she did not contract to sell to plaintiff, but simply employed him as her agent.

(*b.*) Because the evidence shows that plaintiff was the agent of Sarah M. McKibbin, deceased, with reference to the said stock claimed to have been sold to him, and that he was the president of the St. Louis and Mississippi Valley Transportation Company and was also an old and trusted friend of said Sarah M. McKibbin, de-

ceased; that said Sarah M. McKibbin, deceased, relied on him in all these relations and on his advice as to the sale of said stock and as to the value thereof, and because the plaintiff, knowing that fact, took advantage of his said position and told the said Sarah M. McKibbin everything that would tend to depreciate the said stock and carefully and knowingly and intentionally suppressed and concealed from her every fact the knowledge of which would tend to increase the price asked by her for the stock and every fact tending to show the said stock to be valuable, which said facts were within
37 the knowledge of plaintiff and the suppression of which, in consideration of the said fiduciary relation between the parties, was a fraud on the said Sarah M. McKibbin, deceased; in view of which fraud the said contract, if made, became voidable by said Sarah M. McKibbin, deceased, in her lifetime or by her representative after her death and was by said representative, Moylan C. Fox, avoided.

(c.) Because the evidence shows that the claimed acceptance by Haarstick of the proposition of Sarah M. McKibbin, deceased, was never received by her, and that their minds failed to meet in her lifetime.

2. The evidence is insufficient to justify the fifth finding of fact in the same particulars specified under the first specification herein.

Assignments of Error Occurring at the Trial and Excepted to by Defendant.

1. The court erred in failing to find on the following allegations of said defendant's answer:

The defendant alleges that prior to the date of the alleged contract mentioned in the complaint the plaintiff agreed with said Sarah M. McKibbin to act as her agent in the matter of the sale and disposal of said shares of said stock for her, and represented to her by writing that the said company had lately sustained large losses, and that the shares aforesaid had just depreciated 40 per cent. in value and were not worth the value she placed on them, and undertook to sell and dispose of them for her for $92,500; that
38 in fact said company was then in extra prosperous condition and had lately acquired a large cash reserve in its treasury and was about to declare and pay a large dividend on said shares of stock, and that the shares had an increased value by reason of that fact and had not depreciated in value.

That plaintiff was then and is now president of said company and knew the foregoing facts, and said deceased did not know said facts, and, so knowing, the plaintiff wilfully and fraudulently concealed said facts from the deceased and induced deceased to believe that she was about to make an advantageous sale, and any and all action taken and communication had by deceased with plaintiff was induced by and based upon that belief on her part, brought to her mind as aforesaid.

BENNETT, MARSHALL & BRADLEY,
W. H. DICKSON, *Attorneys for Defendant.*

Time within which to serve and present for settlement the statement on motion for a new trial of this action and on appeal from the decree therein having been extended by the court up to and including this date and the same having been duly served and presented for settlement, the foregoing statement is hereby settled and allowed as and for defendant's stat-ment on motion for a new trial and on appeal.

Dated October 3rd, 1892.

C. S. ZANE, *Judge.*

Endorsed: 3rd dist. court. # 8823. Henry C. Haarstick, pl'ff, *vs.* M. C. Fox, ex'r, &c., def't. Statement on motion for new trial. Filed after settlement Nov. 3, 1892. Henry G. McMillan, clerk.

39 HENRY C. HAARSTICK }
vs.
MOYLAN C. FOX, Executor. }

NOVEMBER 3, 1892.

Come now the attorneys for the parties, Arthur Brown, Esq., for the plaintiff, and John A. Marshall, Esq., for defendant, and present the statement on motion for a new trial filed by defendant for settlement, and the same is settled and certified by the court, and the defendant's motion for a new trial is submitted by the counsel, and, being considered by the court and it appearing to the court that the findings of fact and conclusions of law and the judgment herein are sustained by the law and the evidence in the case, and that no sufficient reason appears for granting a new trial herein—

It is ordered that said motion for a new trial be, and the same is hereby, overruled.

40 UTAH TERRITORY, } *ss.:*
Salt Lake County, }

In the District Court of the Third Judicial District.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, Executor of the Last Will and Testament of Sarah M. McKibbin, Deceased, Defendant. } No. 8823.

To the plaintiff above named and to his attorneys, Arthur Brown and Richards and Moyle:

You are notified that the defendant appeals to the supreme court of Utah Territory from the whole and every part of the judgment given and made herein on March 26, 1892, in favor of plaintiff and against defendants, and from the whole and every part of the order made herein November 3, 1892, overruling the defendant's motion for a new trial.

Dated December 1st, 1892.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendant.

Indorsed: 3rd district court. 8823. Henry C. Haarstick *vs.* Moylan C. Fox. Notice of appeal. Filed Dec. 2, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Service of copy admitted. 12, 2, '92. F. S. Richards & Arthur Brown, att'ys for pl'ff.

41 UTAH TERRITORY, } *ss:*
Salt Lake County, }

In the District Court of the Third Judicial District.

HENRY C. HAARSTICK, Plaintiff,
vs.
MOYLAN C. FOX, Executor of the Last Will and Testament of Sarah M. McKibbin, Deceased, Defendant. } No. 8823.

Whereas the defendant above named is about to appeal to the supreme court of Utah Territory from the whole and every part of the judgment given and made herein on March 26, 1892, in favor of plaintiff and against defendant for $13,185.00, damages and costs, and from the whole and every part of the order made herein November 3, 1892, overruling the defendant's motion for a new trial of the action:

Now, therefore, in consideration of the premises, the undersigned defendant, as principal, and John W. Donnellan and George M. Downey, of Salt Lake county, Utah, as sureties, do hereby undertake in the sum of $300.00 and promise that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding said sum of $300.00, and to secure a stay of the execution of said judgment said defendant, as principal, and John W. Donnellan and George M. Downey, of Salt Lake county, Utah, as sureties, do further, jointly and severally, undertake and bind themselves in the sum of $28,000.00, to the effect that if said judgment or order appealed from or any part thereof be affirmed or the appeal be dis-
42 missed said appellant will pay the amount directed to be paid by the judgment or order or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against said sureties for such amount, together with the interest that may be due thereon, and all damages and costs which may be awarded against the appellant upon the appeal.

Witness our hands this 1st day of December, 1892.

MOYLAN C. FOX, *Executor.*
JOHN W. DONNELLAN.
GEORGE M. DOWNEY.

In presence of—
A. H. PEABODY.
J. E. COBB.

UTAH TERRITORY, } ss:
Salt Lake County, }

John W. Donnellan and George M. Downey, being each severally duly sworn, each for himself on his oath says: I am one of the sureties named in and who subscribed the foregoing undertaking on appeal. I am a resident and householder of and within Salt Lake county, Utah Territory. I am worth the sum specified in the foregoing undertaking, to wit, $28,000, over and above all my just debts and liabilities, exclusive of property exempt from execution.

JOHN W. DONNELLAN.
GEORGE M. DOWNEY.

Subscribed and sworn to before me December 2nd, 1892.
[SEAL.] G. F. DOWNEY,
Notary Public, Salt Lake Co., Utah.

Endorsed: 3rd dist. court. # 8823. Henry C. Haarstick *vs.* Moylan C. Fox. Undertaking on appeal. Filed Dec. 2, 1892. Henry G. McMillan, clerk, by George D. Loomis, dep'ty.

43 We, the undersigned attorneys, hereby certify that the foregoing is a full, true, and correct transcript of the record on appeal of the above-entitled matter and cause from the third judicial district court of Utah, Salt Lake county, to the supreme court of Utah Territory.

Dated December 19, 1892.

BROWN & HENDERSON,
Att'ys for H. C. Haarstick.
BENNETT, MARSHALL & BRADLEY,
Att'ys for M. C. Fox, Ex.

44 In the Supreme Court of Utah Territory, Regular January Term, 1893.

HENRY C. HAARSTICK
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Appellant.

MONDAY, *March 27th.*

This cause, coming on regularly for hearing, was argued by John A. Marshall, Esq., in behalf of appellant, and by Arthur Brown, Esq., in reply, was submitted and taken under advisement.

Regular June Term, 1893.

HENRY C. HAARSTICK
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Appellant.

MONDAY, *June 5th.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered,

ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

45 In the Supreme Court of Utah Territory, Regular June Term, 1893.

HENRY C. HAARSTICK
vs.
MOYLAN C. FOX, Executor of the Estate of Sarah M. McKibbin, Deceased, Appellant.

TUESDAY, *June 20th.*

Counsel for appellant this day prays the allowance of an appeal to the Supreme Court of the United States and asks that the amount of a bond to be given thereon be now fixed, and it is ordered that the appeal be allowed as prayed for; and it is further ordered that the amount of a supersedeas bond to be given thereon be fixed at twenty-five thousand dollars ($25,000), and the amount of a bond for costs at five hundred ($500) dollars.

46 In the Supreme Court of Utah Territory.

HENRY C. HAARSTICK, Respondent,
vs.
MOYLAN C. FOX, as Executor of the Last Will of Sarah M. McKibbin, Deceased, Appellant.

MINER, *J.:*

The record in this case presents the following facts: Joab Lawrence died testate December 28th, 1888, being at the time of his death the owner of 1,414 shares of the capital stock of the St. Louis and Mississippi Valley Transportation Company, a Missouri corporation. His widow and devise- thereafter remarried and became Sarah M. McKibbin.

The plaintiff was president of the transportation company, an acquaintance of Joab Lawrence and Mrs. McKibbin, and who assisted her in other matters of business in St. Louis when requested, and who offered his services to her in any matter of business connected with the ascertainment of the true signature of Mr. Lawrence as a friendly act, but without any compensation. The plaintiff resided in St. Louis, had been president of the transportation company since its organization, in 1881, and was reasonably familiar with its business and finances.

The stock of the company was not listed on any stock exchange, had a market in St. Louis alone and among those acquainted with the business of the company. Mrs. McKibbin resided in New York. In the months of January and February, 1890, the financial condition of the transportation company was good and its busi-
47 ness reasonably prosperous, although in the latter month it met with a serious loss in the sinking of the Port Eads, a steamer towing its barges. The plaintiff's witnesses swear that on March 10th, 1890, stock in the transportation company was worth

from $65 to $70 per share, and on April 10th, 1890, from $75 to $80 per share, On June 21st, 1890, the company paid a dividend of six per cent. or six dollars per share on its capital stock, which was the highest dividend ever paid by it, with the exception of one of equal amount paid in 1884.

On December 31st, 1889, Mrs. McKibbin, then residing in New York, wrote to plaintiff at St. Louis that she might wish to dispose of the transportation company stock, asking if there was a market for it and what the market value of the stock was.

On January 2nd, 1890, the plaintiff replied "that it might take thirty or sixty days to place so large a block of the stock, but I think I could place it in that time at from $65 to $70 per share. If you conclude to dispose of your interest and will send the stock to me, I will be pleased to sell it for you."

On January 10th, 1890, Mrs. McKibbin replied that the "Captain" (her late husband, Joab Lawrence) always quoted the stock at par, and she might conclude not to sell.

On January 27th, 1890, she again wrote to plaintiff concerning other business, concluding as follows: "Upon reflection, I think the Miss. Valley stock worth more than the price you named. Let me know if that is the very best you can do."

On February 5th, 1890, the plaintiff replied, answering her former letter and concluding as follows: "With regard to our
48 barge stock, all I can say is that the figure I have mentioned is about as much as you could realize, in my opinion. We are beginning to feel a new all-rail, Kansas City to N. O., the completion of which via Memphis I fear will eventually injure us badly."

On February 10th, 1890, Mrs. McKibbin wrote plaintiff as follows: "I have concluded to sell Miss. Valley Trans. stock for $100,000 (one hundred thousand dollars). If you accept, how long will it take to complete sale?

On February 19th, 1890, plaintiff wrote Mrs. McKibbin, in substance, that the transportation company had met with a "terrible loss" at Memphis, the "Port Eads" having struck a pier of the new bridge there and being a total loss. "In addition, one barge was sunk, besides another badly hurt. The tow was caught and landed, but it may cost us considerable for salvage, and as we carry our own insurance it may take all of $75,000 to make good the loss. This is equal to four per cent. on our stock, and in addition to this it will not be very easy now to dispose of it readily, as parties who might have bought will be fearful on accounts of accidents in the future. If you will sell the 1,414 shares belonging to the estate for $92,500, I will undertake to dispose of them inside of sixty days, but must request an answer by return mail; also, if you will sell, would request that you send the stock, properly endorsed, by express to me at the same time."

On February 25th, 1890, Mrs. McKibbin wrote plaintiff as follows: "Your favor making offer of $92,500 (ninety-two thou-
49 sand and five hundred dollars) for the 1,414 shares of Miss. Trans. stock received, and I say in reply that I accept your

offer, but cannot deliver the stock under forty days. The probate laws here are such that I must wait until I get possession of the stock; otherwise it would have to be sold here at public auction."

On March 1st, 1890, plaintiff wrote Mrs. McKibbin as follows:

"I am in receipt of your letter, dated 25th February, accepting my offer of $92,500 (ninety-two thousand and five hundred dollars) for the 1,414 shares of St. Louis, Miss. Valley Transportation Co. stock belonging to the estate of Joab Lawrence, but that you could not deliver it for forty days from date of your letter. This is perfectly satisfactory to me. When you obtain possession you can draw on me at sight for the amount, with certificates of stock attached, or, if you prefer, I will deposit the amount in any one of our banks you may designate on delivery of the stock to me," etc.

This letter of March 1st reached Salt Lake City, where Mrs. McKibbin then was, on March 4th, 1890. Mrs. McKibbin died on the morning of March 5th, 1890, having been unconscious for twenty-four hours before her death, and she never saw the letter. After her death this letter came into the hands of her administrator and son-in-law, the defendant. The defendant also found enclosed in another letter directed to her a newspaper account of the loss of the "Port Eads," although plaintiff denies having sent it to her. Plaintiff filed his claim against the estate under the statute and it was rejected. The estate refused to deliver the stock. Plaintiff
50 brought suit for a breach of the alleged contract of sale, claiming that the difference between the contract price and the market price when the stock should have been delivered, viz., April 10th, 1890, was $27,690.00; recovered judgment before the court for $13,485, including interest.

The appellant contends that the evidence is insufficient to justify the findings and judgment, because—

1. The evidence shows that defendant's testatrix did not contemplate a sale to plaintiff but an employment of him as her agent to dispose of stock for her.

2. Because plaintiff's letter of March 1st, 1890, was never received by defendant's testatrix and plaintiff's acceptance never communicated to her.

3. Because if the letters in question are held to constitute an agreement to sell to plaintiff, still the evidence further shows that a confidential relation subsisted between plaintiff and Mr. McKibbin which raises a presumption of fraud in the contract, which presumption can only be rebutted by proof that plaintiff prior to the contract fully disclosed to Mrs. McKibbin all his information relative to the value of the stock in question, and the proof is that he did not make such disclosures.

The questions of law involved in this case require the construction of the letters heretofore referred to, and the rights of the plaintiff to recover under the circumstances shown. Mrs. McKibbin claimed to be the owner of 1,414 shares of capital stock of the St. Louis, Mississippi Valley Transportation Co. It does not
51 appear that plaintiff knew the nature of her ownership at the time in question, except by what appears by Mrs. McKibbin's

letters to him. It does appear that Mrs. McKibbin commenced negotiations with plaintiff in December, 1889, looking to the sale of this stock and desiring to know whether or not there was any market for it and what it was. It does not appear that plaintiff was to have any compensation for his services in making a sale or that any broker should do the business as agent.

Plaintiff answered January 2nd, 1890, saying it would take thirty days' time to place it, but he thought he could place it in that time at $65 to $70 per share. Her reply to this indicates that she thought it worth more. Without any answer to this letter, she again writes plaintiff on Jan. 27th, 1890, "Upon reflection I think the stock worth more than the price named. Let me know if this is the very best you can do." This letter would indicate that she was expecting the plaintiff to make the purchase, and that the offer of 65 to 70 was made by him. On February 5th, 1890, plaintiff wrote that in his opinion the offer made was as much as she would be able to realize, giving the reason that they were beginning to feel the effects of new competition, &c. Other letters passed upon matters not connected with this issue, and on February 10th she writes, offering the stock at $100,000, and concluding, "If you accept, how long will it take to complete sale?"

On February 19th, 1890, plaintiff answers this letter, giving an account of the loss of "Port Eads," which would affect the stock, but stating he would undertake to dispose of the stock at $92,500 within sixty days, but wants an immediate answer, with
52 stock enclosed and sent to him by express at the same time.

She replied on February 25th, 1890, saying, "Your favor, making offer of $92,500 for 1,414 shares of stock, received, and I say in reply that I accept your offer, but cannot deliver the stock under forty days," &c.

These letters seem to show good business ability on her part. She fixes the value upon the stock much in excess of that which is offered, after which she declines to accept the offer made. She then names the value placed upon the stock by her late husband in excess of the amount offered; afterwards declines to sell. Then follows with an offer to take $100,000; obtains a definite offer of $92,500, and at once accepts it, with a condition as to delivery.

It does not appear from the record nor from the correspondence that the plaintiff stood in any other relation to her than as a business man of affairs, willing to answer any questions or perform any service that a gentleman could ordinarily perform for an acquaintance without such compensation as an ordinary business relation would permit; and while it is urged by appellant's counsel that, owing to plaintiff's official relations with the company, his extensive knowledge of the affairs of the Co., the increased value of the stock at the time of its promised delivery, his statements as to the loss of the "Port Eads," the building of competing lines of railroad and their consequent effect upon the value of the stock had a direct tendency to mislead Mrs. McKibbin and cause her to sell the stock below its value, yet upon a careful review of the testimony we are unable to find

any statement or representation on the part of the plaintiff that has been shown to be untrue or any act that has been shown
53 to be fraudulent. It is not shown nor can — be presumed from the testimony that the plaintiff had any secret knowledge as to the value of the stock—actual or prospective—as would raise any presumption of fraud against him, such as would cast upon him the burden of showing a full disclosure of any knowledge he possessed concerning it.

The price agreed to be paid is shown to have been the fair value of the stock at that time. As a business proposition, we know that it is seldom that any kind of stock has a fixed, certain, unchangeable value for any considerable length of time. They fluctuate in value as this stock did and might be expected to fluctuate. The broker who assumes to know the most about them is frequently the first one to be deceived. Had this stock declined instead of having appreciated in value after the sale, it is quite certain that under the facts shown Mrs. McKibbin could have received from the plaintiff the price agreed upon or damages consequent upon his failure to perform his contract.

The rule *as* laid down in Cook on Stock and Stockholders, secs. 320 and 321, that "a director of the corporation itself may buy and sell its stock like any other individual. The information which he has of the affairs of the corporation whereby he is enabled to buy or sell at an advantage over the person with whom he deals does not affect the validity of the transaction. He is entitled to the benefit of his facilities for information. There is no confidential relation between him and the stockholder, so far as a sale of stock between them is concerned, and as long as he remains silent
54 and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud."

Gillet *vs.* Bowman, 23 Fed., 625.
Morawetz on Corporations, 565.
Deaderick *vs.* Wilson, 8 Baxter, 108.
Com. *vs.* Reynolds, 44 Ind., 509.
Carpenter *vs.* Danforth, 52 Barb., 581.
2 Pom. Eq. Jur., 902–4.
Allen *vs.* Gillet, 127 U. S., 589.

The testimony shows that there was a plain offer on the part of the plaintiff to buy this stock at $92,500 on the condition Mrs. McKibbin would sell at that price, and that Mrs. McKibbin accepted that offer with the condition that she should have forty days in which to deliver it. From the language used she must have understood that the plaintiff was buying, and he must have understood that she was selling the stock at the price offered and accepted.

The condition inserted by her required a new acceptance from the plaintiff, and on the 1st day of March, 1890, the plaintiff did accept the conditions and offer as a whole.

This last letter of March 1st, in acceptance of her offer of February 25th, was mailed the same day it was written, and reached Salt

Lake City, where Mrs. McKibbin then was, by due course of mail on March 4th, 1890. Mrs. McKibbin died March 5th, 1890, having been unconscious for twenty-four hours, and never saw the letter.

The appellant contends that while Mrs. McKibbin accepted plaintiff's offer of $92,500 for the stock, yet she added a condition to that acceptance which required a new acceptance from the plaintiff, and the contract would not be consummated until plaintiff had not only mailed his acceptance of it, but such acceptance must have
55 been actually communicated to Mrs. McKibbin; in other words, that the assent of Mrs. McKibbin, either express or implied, after the acceptance of the terms proposed by her, is essential to the consum-ation of the contract.

In our view of the law, this cannot be sustained. An unqualified acceptance by the one party of the terms proposed by the other party, transmitted by the usual due course of mail, must be regarded as closing the bargain from the time of the mailing or transmission of the acceptance by mail, and that it is wholly immaterial whether the party proposing ever saw such acceptance or not. We are but following the doctrine well established in this country and as plainly laid down in Taylor *vs.* Merchants' Fire Ins. Co., 9 How., 191, when we say that an offer under the circumstances shown was a valid undertaking on the part of Mrs. McKibbin that she would be bound according to the offer tendered if an answer thereto was transmitted in due course of mail accepting the offer, and as held in the case of Taylor *vs.* Merchants' Firs ins. Co., such offer cannot be withdrawn unless the withdrawal reaches the party — whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

In the same case the court say that "on acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him and shall be in due time
56 accepted or rejected."

"Such is the plain import of the offer, and besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for their approval or rejection.

"The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted; this is the point of the objection; but a little reflection will show that in all cases of contracts entered into between parties at a distance, by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

"It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence if a knowledge

of both parties at the moment they become bound is an essential element in making out the obligation, and it must take effect, if effect is given at all, to an endeavor to enter into a contract by correspondence in the absence of the knowledge of one of the parties at the time of its consummation, — it seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated instead of postponing its completion till notice of such acceptance has been received and assented to by the company."

57 The unqualified acceptance of one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance. This is the American doctrine.

3 Am. and Eng. Enc. of Law, p. 856.
1 Parsons on Con., p. 28.
Eliason *vs.* Henshaw, 4 Wheat., 225.
Administrator *vs.* Frith, 6 Wend., 103.
Brisban *vs.* Boyd, 4 Paige, 17.
Gerrier *vs.* Storr, 63 Iowa, 484.
Hunt *vs.* Higman, 70 Iowa, 406.
Time *vs.* McLean, 80 Ala., 360.

It is contended that the court erred in failing to find facts on the question of fraud set up in the answer.

The court found separatively and specifically that the contract set up in the complaint was sustained by the evidence. This finding necessarily negatives any fraud, as alleged, and is sufficient to sustain the judgment.

Kisling *vs.* Shaw, 33 Cal., 425.
Malone *vs.* County Del Norte, 77 Cal., 217.
95 Cal., 347.
90 Cal., 323.
Maxfield *vs.* West, 6 Utah, 327–379.

Upon the whole record we find no error. The judgment of the trial court is affirmed with cost.

I concur.

G. W. BARTCH, *J.*

Endorsed: ≠340. Title court and cause. Opinion. Filed Jun-5, 1893. Jos. P. Bache, clerk.

58 By the Honorable Charles S. Zane, chief justice of Utah, to Henry C. Haarstick and to Messrs. Brown & Henderson, and to Richards & Moyle, his attorneys, Greeting:

Whereas Moylan C. Fox, executor of the estate of Sarah M. McKibbin, deceased, has lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of Utah Territory in favor of you, the said Henry C. Haarstick, and having filed the security required:

You are therefore hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the city of Washington, D. C., within sixty (60) days from date of this citation, to do and receive what may pertain to justice to be *be* done in the premises.

Given under my hand, at the City of Salt Lake, in the Territory of Utah, this 4th day of August, A. D. 1893.

[Seal Supreme Court, Territory of Utah, United States of America.]

C. S. ZANE,
Chief Justice of Utah Territory.

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Due service of a copy of the above citation admitted this 10th day of August, A. D. 1893.

BROWN & HENDERSON,
RICHARDS & MOYLE,
Attorneys for Respondent.

58½ [Endorsed:] Supreme court of Utah. File No., 340. Moylan C. Fox, as executor of the last will, etc., Sarah M. McKibbin, deceased, appellant, *vs.* Henry C. Haarstick. Citation. Filed Aug. 4th, 1893. Joseph P. Bache, clerk.

59 In the Supreme Court of Utah Territory.

MOYLAN C. FOX, as Executor of the Last Will and Testament of Sarah M. McKibbin, Deceased, Appellant,
against
HENRY C. HAARSTICK, Respondent.

Whereas the above-named appellant, Moylan C. Fox, as executor of the last will and testament of Sarah M. McKibbin, deceased, is about to appeal to the Supreme Court of the United States of America from the whole and every part of the judgment herein rendered in the supreme court of Utah Territory on the 5th day of June, 1893, in favor of the above-named respondent, Henry C. Haarstick, and against said appellant, Moylan C. Fox; and

Whereas said appellant is desirous of staying the execution of said judgment so appeale- from and of superseding the same; and

Whereas said judgment was for the recovery from said appellant by said respondent of the sum of $13,485.00, with legal interest thereon from the date of judgment:

Now, therefore, in consideration of the premises and of the stay of execution on said judgment, we, Moylan C. Fox, as executor as aforesaid, as principal, and John W. Donnellan and George M. Downey, all of Salt Lake City, Salt Lake county, Utah, do
60 hereby jointly and severally undertake and promise and acknowledge ourselves jointly and severally bound in the sum of $27,300.00, being double the amount of said judgment and

interest thereon, that if the said judgment appealed from or any part thereof be affirmed or the appeal be dismissed or the appeal be not prosecuted to effect the appellant will pay the amount directed to be paid hereby or the amount as to which the same shall be affirmed if affirmed only in part, and all damages and costs which shall be awarded against appellant on the appeal.

In witness whereof we have hereunto set our hands and seals, at Salt Lake City, Salt Lake county, Utah Territory, this 27th day of July, 1893.

MOYLAN C. FOX,
Executor of Last Will and Testament of
Sarah M. McKibbin, Deceased.
JOHN W. DONNELLAN.
GEORGE M. DOWNEY.

Signed in the presence of—
W. M. BRADLEY.

Approved by me this 4th day of August, 1893.

C. S. ZANE,
Chief Justice.

61 UTAH TERRITORY, } ss:
County of Salt Lake, }

John W. Donnellan and George M. Downey, being each duly sworn, each for himself on his oath says that he is a householder and resident of Salt Lake City and county, Utah, and is worth the sum of $27,300, which is the penalty mentioned in the foregoing undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN W. DONNELLAN.
GEORGE M. DOWNEY.

Subscribed and sworn to before me July 27, 1893.
[SEAL.]
G. F. DOWNEY,
Notary Public, Salt Lake Co., Utah.

Endorsed: Title court and cause. Supersedeas bond on appeal. Filed Aug. 4th, 1893. Joseph P. Bache, clerk. Bennett, Marshall & Bradley, att'ys for appellant.

62 In the Supreme Court of Utah Territory.

MOYLAN C. FOX, as Executor of the Last Will and Testament of Sarah M. McKibbin, Deceased, Appellant,
against
HENRY C. HAARSTICK, Respondent.

Know all men by these presents that we, the undersigned appellant, as principal, and John W. Donnellan and George M. Downey, as sureties, all of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto the above-named Henry C.

Haarstick in the sum of $500.00, to be paid to said Henry C. Haarstick or his assigns; for the payment of which sum, well and truly to be made, we hereby bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, 1893.

Whereas the above-named Moylan C. Fox, as executor of the last will and testament of Sarah M. McKibbin, deceased, has appealed to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled cause in the supreme court of Utah Territory:

Now, therefore, the condition of *the* obligation is such that if the above-named Moylan C. Fox, as executor of the last will and
63 testament of Sarah M. McKibbin, deceased, shall prosecute his plea and appeal to effect and answer all damages and costs if he fails to make his plea and appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MOYLAN C. FOX,
Exc. Last Will and Testament of
Sarah M. McKibbin, Deceased.
JOHN W. DONNELLAN.
GEORGE M. DOWNEY.

Signed in the presence of—
W. M. BRADLEY.

UTAH TERRITORY, } *ss:*
Salt Lake County, }

John W. Donnellan and George M. Downey, being first duly sworn, each for himself on his oath says that he is a householder and resident of Salt Lake City and county, Utah, and is worth the sum of $500.00, which is the penalty mentioned in the foregoing undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN W. DONNELLAN.
GEORGE M. DOWNEY.

Subscribed and sworn to before me August 4, 1893.

G. F. DOWNEY,
[SEAL.] *Notary Public, Salt Lake Co., Utah.*

Approved this 4th day of August, 1893.

C. S. ZANE,
Chief Justice Supreme Court, Utah Territory.

Endorsed: Title court and cause. Cost bond on appeal. Filed Aug. 4th, 1893. Joseph P. Bache, clerk. Bennett, M. & B., att'ys for appellant.

64 In the Supreme Court of the United States.

MOYLAN C. FOX, as Executor of the Last Will of Sarah M. McKibben, Deceased, Appellant,
vs.
HENRY C. HAARSTICK, Respondent.

Now comes said appellant above named and by his attorney says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit: that the supreme court of Utah Territory erred in affirming the judgment of the trial court, because said trial court erred in failing to find on the following allegations of said defendant's answer, to wit:

"The defendant alleges that prior to the date of the alleged contract mentioned in the complaint the plaintiff agreed with said Sarah M. McKibben to act as her agent in the matter of the sale and disposal of said shares of said stock for her and represented to her by writing that the said company had lately sustained large losses, and that the shares aforesaid had just depreciated 40% in value and were not worth the value she placed on them, and undertook to sell and dispose of them for her for $92,500; that in fact said company was then in extra prosperous condition and had lately acquired a large cash reserve in its treasury and was about to declare and pay a large dividend on said shares of stock, and that the shares had an increased value by reason of that fact and had not depreciated in value; that plaintiff was then and is now president of said company and knew the foregoing facts and said deceased did not know, and plaintiff knew that deceased did not know said facts, and, so knowing, the plaintiff willfully and fraudulently concealed said facts from the deceased and induced the deceased
65 to believe that she was about to make an advantageous sale, and any and all action taken and communication had by deceased with plaintiff was induced by and based upon that belief on her part, brought to her mind as aforesaid."

2. The supreme court of Utah erred in affirming said judgment because said trial court erred in failing to find on the defense of fraud set up in defendant's answer, findings in writing not having been waived.

Wherefore the said appellant prays that the judgment of the supreme court of Utah Territory be reversed, and that the said supreme court of Utah Territory be ordered to enter a judgment reversing the judgment of the trial court herein and ordering a new trial of this action.

C. W. BENNETT,
J. A. MARSHALL,
Attorneys for Appellant.

[Endorsed:] In the Supreme Court United States. Moylan C. Fox, as executor, etc., app'l't, *vs.* Henry C. Haarstick, resp't. Assignment of errors and prayer for reversal. Filed August 4th, A. D. 1893. Joseph P. Bache, clerk.

66 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court in and for the Territory of Utah, pursuant to an appeal allowed in the case of Moylan C. Fox, as executor *for* the last will and testament of Sarah M. McKibbin, deceased, as appellant, *vs.* Henry C. Haarstick, as respondent, lately pending in said court, do hereby certify that the foregoing is a full, true, and correct copy of the transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, and that the citation is the original as filed with me, all in and of said court in said cause.

Seal Supreme Court Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of said supreme court, at Salt Lake City, Utah, this 6th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 15,395. Utah Territory supreme court. Term No., 577. Moylan C. Fox, as executor of the last will and testament of Sarah M. McKibbin, deceased, appellant, *vs.* Henry C. Haarstick. Filed September 21, 1893.

156-614

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Office Supreme Court, U. S.
FILED.
JAN 3 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

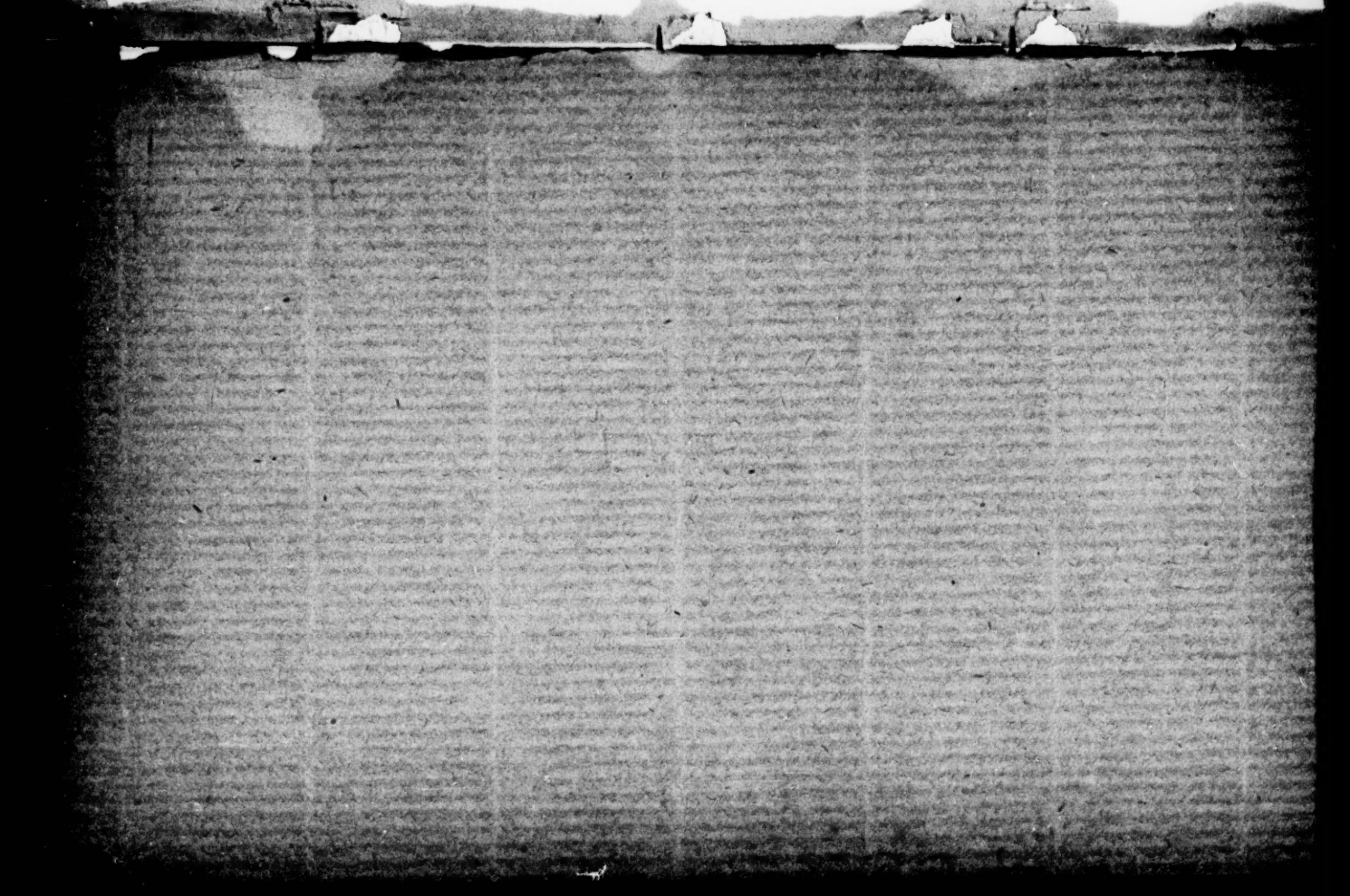
MOYLAN C. FOX, AS EXECUTOR OF THE LAST WILL OF SARAH M. McKIBBIN, DECEASED, APPELLANT,

vs.

HENRY C. HAARSTICK, RESPONDENT.

BRIEF FOR APPELLANT.

C. W. BENNETT,
J. A. MARSHALL,
W. M. BRADLEY,
Attorneys for Appellant.



SUPREME COURT OF THE UNITED STATES.

MOYLAN C. FOX, AS EXECUTOR OF THE LAST WILL OF SARAH M. McKIBBIN, DECEASED, APPELLANT,

vs.

HENRY C. HAARSTICK, RESPONDENT.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal from a judgment of the Supreme Court of Utah Territory affirming a judgment of the trial court in favor of respondent.

The respondent brought suit alleging among other matters that on March 1st, 1890, he made a written contract with appellant's testatrix for the sale by her to respondent and the delivery within forty days of 1414 shares of the capital stock of the St. Louis & Mississippi Valley Transportation Company for the sum of $92,500. That on April 10th, 1890, when the stock should have been delivered it was of the value of $120,190. The death of said testatrix and appellant's refusal to perform the contract.

The appellant in his amended answer pleaded separately two defenses. The first was a denial of the contract and of the claimed value of the stock.

The second was as follows, to-wit:

And for a second and separate defense the defendant alleges that prior to the date of the alleged contract mentioned in the complaint the plaintiff agreed with said Sarah M. McKibbin to act as her agent in the matter of the sale and disposal of said shares of said stock for her, and represented to her by writing that the said company had lately sustained large losses, and that the shares aforesaid had just depreciated forty per cent. in value and were not worth the value she placed on them, and undertook to sell and dispose of them for her for $92,500; that in fact said company was in extra prosperous condition and had lately acquired a large cash reserve in its treasury and was about to declare and pay a large dividend on said shares of stock, and that the shares had an increased value by reason of that fact and had not depreciated in value; that plaintiff was then and is now president of said company and knew the foregoing facts, and said deceased did not know said facts, and so knowing, the plaintiff wilfully and fraudulently concealed said facts from the deceased and induced deceased to believe that she was about to make an advantageous sale, and any and all action taken and communication had by deceased with plaintiff was induced and based upon the belief on her part brought to her mind as aforesaid.

That said extraordinary dividend was, soon after March 1, 1890, declared and paid on the shares of stock in said company except on said 1414 shares, and by connivance with and at the instigation of plaintiff, as its president, said company has refused to pay and has not paid the dividend aforesaid on said 1414 shares.

Record p. 3.

Both of these defenses were insisted on throughout the case which was tried before the court without a jury.

the trial court made its finding of facts which was in substance as follows:

1—That appellant was the executor of the last will of Sarah M. McKibbin, deceased.

2—That by written correspondence between Sarah M. McKibbin, deceased, and plaintiff, dated February 25th, 1890, and March 1st, 1890, said Sarah M. McKibbin contracted to sell and deliver to plaintiff the stock described in plaintiff's complaint for the sum therein stated.

3—That on March 5th, 1890, said Sarah M. McKibbin died and her executor then refused and has ever since refused to fulfill such contract.

4—That plaintiff has been always ready to pay the sum of $92,500 for said stock on the delivery thereof.

5—That on April 10th, 1890, when said stock should have been delivered it was worth the sum of $104,500, and that plaintiff has been damaged by defendant's failure to deliver the same in the sum of $13,485.

6—That the plaintiff in proper time and in due form presented to said executor his claim against the estate of said deceased and that the same was rejected by said executor.

And as a conclusion of law from the foregoing facts, that the plaintiff was entitled to judgment for the sum of $13,485.

Record, pp. 4 and 5.

The second defense pleaded by defendant was ignored in the findings.

The facts disclosed by the record and tending to sustain such second defense are as follows:

Joab Lawrence died testate, December 28th, 1888, being

at the time of his death the owner of 1414 shares of the capital stock of the St. Louis and Mississippi Valley Transportation Company, a Missouri corporation. His widow and devisee thereafter re-married and became Sarah M. McKibbin.

The plaintiff was president of the Transportation Company, an old acquaintance of Joab Lawrence, an acquaintance of Mrs. McKibbin, to whom she looked for information as to the value of the Transportation Stock, and who assisted her in other matters of business in St. Louis, and who proffered his services to her in any matter of business. The plaintiff resided in St. Louis, had been president of the Transportation Company since its organization in 1881, and was familiar with its business and finances.

The stock of the Company was not listed on any stock exchange, had a market in St. Louis alone and among those acquainted with the business of the company. Mrs. McKibbin did not reside in Missouri, was presumably unfamiliar with the value of the stock, since she applied to plaintiff for information as to such value, and had no other information concerning that value or concerning the financial condition of the company, than that furnished her by the plaintiff. In the months of January and February, 1890, the financial condition of the Transportation Company was very good and its business prosperous, although in the latter month it met with a serious loss in the sinking of the "Port Eads" a steamer towing its barges. The plaintiff's witnesses swear that on March 10th, 1890, stock in the Transportation Company was worth from 865 to 870 per share, and on April 10th, 1890, from 875 to 880 per share; the plaintiff placing the value on the date last named at 880 per share. One June 21st, 1890, the company paid a dividend of six per cent. or six dollars per share on its capital stock which was the highest dividend ever paid

by it with the exception of one of equal amount paid in 1884.

On December 31st, 1889, Mrs. McKibbin, then residing in New York, wrote to plaintiff, at St. Louis, that she might wish to dispose of the Transportation Company stock asking if there was a market for it and what the market value of the stock was.

Record, p. 7.

On January 2d, 1890, the plaintiff replied,

"That it might take thirty or sixty days to place so large a block of the stock, but I think I could place it in that time at from $65 to $70 per share. *If you conclude to dispose of your interest and will send the stock to me, I will be pleased to sell it for you.*"

Record, pp. 7 and 8.

On January 10th, 1890, Mrs. McKibbin replied that the "Captain" (her late husband, Joab Lawrence) always quoted the stock at par and she might conclude not to sell it.

Record, p. 8.

On January 27th, 1890, she again wrote to plaintiff, forwarding to him a photograph of a paper held by a certain Mr. Whitney, and also another signature, and asking him if in his opinion they were both written by Mr. Lawrence; also, inquiring as to experts in hand-writing, and the cost of having a test made, and concluding as follows:

"Upon reflection I think the Miss. Valley stock worth more than the price you named; let me know if that is the very best you can do."

Record, p. 8.

On February 5th, 1890, the plaintiff replied, giving his opinion as to the photograph and signature sent him, recommending an expert in handwriting and enclosed a

letter received by him from the expert in reply to his inquiry as to the cost, and concluding as follows:

> "With regard to our Barge stock all I can say is that the figure I have mentioned is about as much as you could realize in my opinion. We are beginning to feel a new all rail, Kansas City to N. O, the competition of which via Memphis I fear will eventually injure us badly."
>
> Record, pp. 8-9.

On February 1st, 1890, Mrs. McKibbin wrote to plaintiff a long letter about business connected with the estate of Joab Lawrence and asking plaintiff to give her information about various matters, but in no way referring to the stock in the Transportation Company.

Record, p. 9.

On February 7th, 1890, the plaintiff answered the letter of February 1st, 1890, giving the information desired, and expressing his readiness to assist Mrs. McKibbin in any way he could do so.

Record, pp. 9-10.

On February, 10th, 1890, Mrs. McKibbin wrote plaintiff as follows:

> "I have concluded to sell Miss. Valley Trans stock for $100,000 (one hundred thousand dollars). If you accept how long will it take to complete the Sale?"
>
> Record, p. 10.

On February 12th, 1890, Mrs. McKibbin again wrote plaintiff; asking him to make certain inquiries in St. Louis for her touching business connected with the Joab Lawrence estate but not concerning the stock in question.

Record p. 10.

On February 19th, 1890, plaintiff wrote Mrs. McKibbin in substance that the Transportation Company had met with a "terrible loss" at Memphis; the "Port Eads" hav-

ing struck a pier of the new bridge there and being a total loss.

> "In addition one barge was sunk, besides another badly hurt. The tow was caught and landed, but it may cost us considerable for salvage, and as we carry our own insurance it may take all of $75,000 to make good the loss. This is equal to four per cent on our stock, and in addition to this it will not be very easy now to dispose of it readily as parties who might have bought will be fearful on account of accidents in the future. If you will sell the 1414 shares belonging to the estate for $92,500 *I will undertake to dispose of them* inside of sixty days, but must request an answer by return mail; also, if you will sell, would request that you send *the stock, properly endorsed*, by express, *to me at same time*."

(The Italics are ours.)

Record, pp. 10-11.

On February 25th, 1890, Mrs. McKibbin wrote plaintiff as follows:

> "Your favor making offer of $92,500 (ninety-two thousand and five hundred dollars) for the 1414 shares of Miss Valley Trans. stock received, and I say in reply, that I accept of your offer, but cannot deliver the stock under forty days. The probate laws here are such that I must wait until I get possession of the stock, otherwise it would have to be sold here at public auction."

Record, p. 11.

On March 1st, 1890, plaintiff wrote Mrs. McKibbin treating her last letter as an offer to sell to him and accepting it. And also wrote her as to the result of various inquiries he had made for her in St. Louis, concerning other business affecting the Lawrence estate and concluding, "pleased to serve you at any time, and trusting you will call upon me for any information I may have, I remain," etc.

Record, p. 11.

This last letter reached Salt Lake City, where Mrs. McKibbin then was, on March 4th, 1890; Mrs. McKibbin died on the morning of March 5, 1890, having been uncon-

scious for twenty-four hours before her death and never saw the letter.

After her death the letter, still unopened, came into the hands of the defendant. The defendant also found enclosed in one of the letters written by plaintiff to Mrs. McKibbin, the newspaper account of the loss of the "Port Eads" found on pp. 16, 17 and 18 of the record, although plaintiff denied having sent her such newspaper clipping.

The sum of $92,500 amounted to $65.41 per share of stock.

The executor refused to deliver the stock; the plaintiff brought suit for the breach of the alleged contract, claiming that the difference between the contract price and the market price when the stock should have been delivered, viz: April 10, 1890, was $27,690.

SPECIFICATION OF ERRORS.

1—It was error to fail to find on the issues raised by the following averments in the defendant's answer, to-wit:

> "The defendant alleges that prior to the date of the alleged contract mentioned in the complaint the plaintiff agreed with said Sarah M. McKibbin to act as her agent in the matter of the sale and disposal of said shares of said stock for her and represented to her by writing that the said company had lately sustained large losses, and that the shares aforesaid had just depreciated 40 per cent. in value and were not worth the value she placed on them, and undertook to sell and dispose of them for her for $92,500; that in fact said company was then in extra prosperous condition and had lately acquired a large cash reserve in its treasury and was about to declare and pay a large dividend on said shares of stock, and that the shares had an increased value by reason of that fact and had not depreciated in value; that plaintiff was then and is now president of said company and knew the foregoing facts and said deceased did not know said facts; and, so knowing, the plaintiff wilfully and fraudulently concealed said facts from the

deceased and induced the deceased to believe that she was about to make an advantageous sale, and any and all action taken and communication had by deceased with plaintiff was induced by and based upon that belief on her part, brought to her mind as aforesaid."

2.—It was error to fail to find on the issue of fraud set up in defendant's answer.

Record, p. 34.

The only questions presented on this appeal arise on the failure of the trial court to find on said issues.

ARGUMENT.

POINT I.

The failure of the Court to find on all material issues is error.

Appellant's second defense was new matter in avoidance of the respondent's contract.

The Code of Utah does not provide for a replication but in lieu thereof it is enacted in §3248, Compiled Laws of Utah, Volume 2, as follows:

"Every material allegation of the complaint not controverted by the answer, must for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

So that the statute raised an issue on appellant's second defense.

By §§ 3379, 3380, 3381, Volume 2, Compiled Laws of Utah, it is further enacted:

"§ 3379. Upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision."

"§ 3380. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

"§ 3381. Findings of fact may be waived by the several parties to an issue af fact:

1—By failing to appear at the trial.

2—By consent in writing, filed with the clerk.

3—By oral consent, in open court, entered in the minutes."

The foregoing sections were borrowed by Utah from California.

As the court made written findings there can be no presumption that such findings were waived.

In Peo. vs. Forbes, 51 Cal. 628, action was brought to enforce a lien on a lot in San Francisco for a street assessment. The answer was a confession and avoidance. The only supposed finding of facts was contained in the decree where by way of recital it was stated: "And it further appearing that said complaint was duly verified, the court finds all the facts as stated in said complaint." As to the claim that a presumption arose that written findings were waived the court said:

"We held here (in Mulcahy vs. Glazier, ante p. 626) that if the record were entirely silent upon the question as to whether there had been a waiver of the findings of facts, we would presume in aid of the judgment below that such waiver had occurred. But it is clear that in view of the finding here made and appearing in the record, no such presumption of a waiver of findings can be indulged."

Hayne on New Trial and Appeal, § 241.

The present code provisions, both in California and Utah, as to findings require express findings in contrast to the old system of implied findings. In respect to this system Mr. Hayne says:

"Under the system of express findings on the other hand, nothing is implied, but full findings are required upon every material issue, without any request therefor, and without any exceptions on account of defects: [The statute providing that it

is deemed to have been excepted to. §3392, Vol. II, Comp. Laws of Utah] and if any material issue is left unfound it is ground for reversal of the judgment."

Hayne on New Trial and Appeal, §239, p. 718.

And there seems to be a concurrence of authority on this point.

Campbell vs. Buckman, 49 Cal. 362-367.
N. P. R. R. Co. vs. Reynolds, 50 Cal. 90, 93.
Dowd vs. Clark, 51 Cal. 263.
Everson vs. Mahew, 57 Cal. 144.

But we do not understand that respondent denies these general principles, but on the other hand contends:

(a)—That the second finding of fact which affirmed the making of the contract by implication negatived the defense of fraud and that a finding as to such became afterwards immaterial.

(b)—And perhaps that the evidence in the record had no tendency to prove the fraud and hence the failure to find thereon was error without prejudice to appellant.

POINT II.

Did the Second Finding, by implication, cover the defense of fraud

That finding was to the effect that on a certain day the plaintiff and Mrs. McKibbin entered into the contract sued on. It was a finding on the issue raised by a denial of that contract in the first defense interposed. It was contended by appellant that taking the entire correspondence it appeared that Mrs. McKibbin viewed the plaintiff as her agent to sell the stock in question to some other purchaser, and that she never consented to sell to the plaintiff. This issue was concluded by the second finding. But that finding goes no farther. It does not reach any defense which might still exist notwithstanding the original concurrence of the minds of the parties. The finding did

affirm an existing contract and nothing in it is inconsistent with appellant's contention that it was affected with fraud and that he had elected to disaffirm it.

Dawes vs. Harness L. R., 10 C. P. Cas., 166.

The object of the statute in requiring findings of fact and that they should be stated separately from the conclusions of law; is to facilitate a review of the case by an appellate court. Such a court, reviewing errors of law simply, will accept the facts as found and then determine if the law has been properly applied to such facts. But if the simple finding that a contract was made on a certain date impliedly determined the affirmative defenses to it, then although the trial court should hold that such affirmative defenses were true in fact but unavailing in law there would be no way to review this pure question of law, and the very object of findings of fact would be defeated.

In the case of the Peo. vs. Forbes, 51 Cal. 628, the action was to enforce a lien on a lot in San Francisco for a street assessment. The answer set up as an affirmative defense that the owners of a majority of the frontage lots on the street improved did not sign the petition to improve the street, and that therefore the Board of Supervisors did not acquire jurisdiction. The court found the facts stated in the complaint were true and plaintiff had judgment. The Supreme court said:

> "Now in view of the circumstance that the defense did not rest either in whole or in part upon a denial of the allegations of the complaint, but entirely upon the new matter set up in the answer, a finding of 'all the facts as stated in the complaint' was not a disposition of the issues of fact involved in the case."

So in the case at bar the second defense rests entirely on affirmative matter.

In the case of Heinlen vs. Irrigation Co. 68 Cal. 35, suit was brought by plaintiff claiming to be a riparian

owner to enjoin the diversion of water by defendant. The defendant pleaded appropriation and five years adverse diversion. The court found in favor of plaintiff's riparian rights but failed to find on defendant's plea of adverse diversion. For this the case was reversed. It would seem that the finding of title in the plaintiff would impliedly negative such title in the defendant, but it did not follow that the court found the facts showing adverse user against the defendant. The result may have been due to erroneously applying the law. And to facilitate the correction of such errors the system of express findings was enacted.

It is true that in the Supreme Court of the Territory appellant could attack the findings by showing that the evidence was insufficient to justify them, but if the evidence was conflicting or such that men might reasonably differ as to the conclusions to be drawn therefrom the appellate court must affirm, reaching its conclusion through a conflict of evidence on a finding of great generality perhaps while the trial court had reached the same conclusion through an error of law. Besides to attack a finding it is necessary, under the statute, to specify the particulars in which the evidence is insufficient to justify it. The evidence might amply sustain a finding that on March 1st, 1890, the plaintiff and Mrs. McKibbin entered into a certain contract and at the same time as plainly show that such contract was fraudulent.

The authorities cited by respondent before the Supreme Court of Utah do not sustain his position.

In Kisling vs. Shaw, 33 Cal. 425, suit was brought to set aside a conveyance from client to attorney for fraud in its procurement. The trial court found that the price paid for the land was fair and adequate and also expressly found that there was no fraud. It was claimed by the appellant that the evidence was insufficient to justify the finding as

to fraud. The Supreme Court held, against the weight of authority, that even if there was fraud the client would have to show in addition thereto, that the price obtained was inadequate, and as the finding that the price paid was adequate was supported by the evidence, the fraud was without damage to plaintiff, and the issue on it became immaterial.

It is worthy of note that Judge Sawyer specially concurred on the ground that the evidence justified the findings of the court. Not on the ground that in the case of fraudulent abuse of a confidential relation the injured party must show an inadequacy of consideration or the fraud becomes immaterial. But in any event the case does not assist respondent. It is not intimated that it would have been sufficient to find that on a certain day the client conveyed to his attorney certain land, or that it is unnecessary to find on affirmative defenses. The case is based on the doctrine that when such facts are found as will determine the action in a certain way, irrespective of the truth or falsity of the other allegations then such other averments become immaterial. And to this extent only the other cases relied on by the respondent go. With this general doctrine we have no quarrel.

POINT III.

Appellant's second defense was well pleaded and the record discloses evidence to prove it.

There was no demurrer to this defense nor objection to the introduction of testimony thereunder. It correctly presented appellant's contention that there was a confidential relation between the plaintiff and Mrs. McKibbin which made it incumbent on him to disclose to her all facts known to him touching the value of the stock, both its market and intrinsic value.

The evidence tended to sustain this plea.

The plaintiff undertook to act as Mrs. McKibbin's agent in the sale of the stock in question. In his letter to her of January 2nd, 1890, he says:

> "I would state that it might take 30 or 60 days to place so large a block of the stock but I think I could place it in that time at from $65 to $70 per share. If you conclude to dispose of your interest and will send the stock to me I will be pleased to sell it for you."
>
> Record pp. 7 and 8.

In his letter of February 19th, 1890, record pp. 10 and 11, he wrote her as follows:

> "If you will sell the 1414 shares belonging to the estate for $92,500 I will undertake to dispose of them inside of 60 days, but must request an answer by return mail. Also, if you will sell, would request that you send the stock, properly endorsed, by express to me at the same time."

Mrs. McKibbin had a right to treat any representations that the plaintiff made to her as to the value of the stock as made in the capacity of her agent to sell the stock. It may be that the plaintiff truly disclosed to her the market value of the stock but he had knowledge of the good financial condition of the Transportation Company, which made probable the unusually large dividend soon after declared, and which knowledge, not being public property, presumably did not affect or only imperfectly affected the market price. The fact that a few weeks thereafter the market price, according to plaintiff's testimony, advanced $15.00 per share, shows the importance of this knowledge, which it is admitted by the plaintiff that he possessed, but did not communicate. On the other hand the plaintiff did state to Mrs. McKibbin every fact tending to depreciate the value of the stock without the facts tending to enhance its value, to induce her to place a lower price than she would otherwise have done.

It is very evident from the correspondence that the only thing which induced her to fix the price at $92,500 was hearing from the plaintiff the bad news without the good.

There will probably be little controversy that if the fiduciary or confidential relation be once shown to exist between the plaintiff and Mrs. McKibbin, the law would raise a presumption of fraud in the contract and would cast on plaintiff the burden of overcoming such presumption, by proof, that he made a full disclosure of all he knew respecting the property; that Mrs. McKibbin knew with whom she was dealing and made no objections and finally that the consideration was fair and just.

Fox vs. Mackreth, White & Tudor's Leading Cases in Equity, Vol. I, Pt. 1, p. 212.
1st Bigelow on Fraud, pp. 135, 261 and 295.

But the question remains was there such a fiduciary relation in the case at bar. Mrs. McKibbin was one of the stockholders in the Transportation Company, she having succeeded to her husband's stock therein. The plaintiff was its president and by vote and as representative of the stockholders was placed in a position to gain a special knowledge of the real value of the stock of the company. The subject matter of the contract was that stock, and the plaintiff is seeking to retain an advantage gained by the possession of such knowledge. To say that the plaintiff was a trustee of the corporation, but not of its stockholders, is but basing a rule of law on a fiction adopted without reference to such rule. The existence of a corporation independently of its stockholders is a fiction, and the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.

Morawitz on Corporations, Secs. 1, 227 and 228.

The contrary view is based on two cases—Carpenter vs. Danforth, 52 Barbour, 581; and Tippecanoe Co. vs. Reynolds, 44 Indiana, 509.

The first case is criticised and disapproved in Perry's note to I Story's Equity Jurisprudence, § 229 b. (12th ed.) although this criticism is omitted by a subsequent editor. As to the last case Mr. Bigelow says:

> "The decision was not unanimous, and the subject is worthy of further consideration. The court was perhaps correct in holding that the president of the company was not in strictness a trustee toward the vendor; but it is quite another thing to say that no relation of confidence and trust existed between the parties. And that is all that is necessary to require disclosure."
>
> I Bigelow on Fraud, 331.

But in the Indiana case the Court said: "It is not shown by the evidence that there was any special trust or confidence reposed in the defendant by the plaintiff, which was violated by the former, or of which he took advantage," and it is this feature of the case at bar which differentiates it from the two authorities above quoted.

The term "fiduciary relation" arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another.

> I Bigelow on Fraud, 262.
>
> Harkness vs. Fraser, 12 Florida, 336.

> "There is no magic in the terms trust and trustee. He is a trustee in techinal style who is vested with property in trust for others; but every man has a trust to whom a business is committed by another, or the charge and care of any concern, is confided or delegated by commission."
>
> Beeson vs. Beeson, 9 Barr, 279, 284.

> "Moreover, although there is no particular relation between the parties, such as that of trustee and cestui que trust, principal and agent, solicitor and client, if there exist a confidence between them, of such a character as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any trans-

> action between the parties to stand unless there have been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him."
>
> White & Tudor's Leading Cases in Equity, Vol. I, Pt. 1, 233.

In Tate vs. Williamson, L. R. 2 Ch. App. 55, the facts were that Tate, a young man twenty-three years old, was pressed for payment of his college debts. He wrote to his great uncle for advice and assistance as to the payment of the debts. The uncle deputed the defendant, his nephew, to see Tate on the subject. The defendant met Tate by appointment and made him an offer for his estate. The offer was accepted; but before the agreement was signed the defendant obtained a valuation of the estate by a surveyor and this valuation was not communicated to Tate. Tate's heir filed a bill to impeach the sale, and it was held that the defendant had stood in a fiduciary relation to Tate, that made it his duty to communicate to him all material information which he acquired affecting the value of the property; and that as he had not communicated the valuation to Tate, the transaction must be set aside.

In Mallory vs. Leach, 35 Vermont 156, the defendant advised plaintiff to buy fifty shares of mining stock, professing to act as her friend, and from a desire to invest her money so as to make her independent, and with his own guaranty that she should get back her money and at least twenty per cent. interest. He also told her that as he was interested in the stock, he would keep her informed as to its situation and value: About a year and a half thereafter, the stock then being very valuable, the defendant informed plaintiff that it was to be heavily assessed, which was true, but without informing her of the

other facts within his knowledge showing its great value, the court said:

> "It was telling the truth, but not the whole tuth; it was telling it in a manner to produce the effect of falsehood. The defendant must have felt that what he said would depress the plaintiff's estimate of her stock—would lead her to think its value much less than it was, and he knew she was ignorant of its value. Now he might be silent—might say nothing, but he had no right to produce a delusion by his language, and knowingly take advantage of it for his own benefit. This was not fair dealing."

This language, it seems to us, is especially appropriate to the case at bar. Mrs. McKibbin, a woman, far from St. Louis, where alone the stock in question could be sold, wrote to the acquaintance of herself and her former husband as to its value, relying on his friendship and being encouraged by his offers to assist her. Continuing to rely on it, not only as to the stock but in other business matters, she sought no other advice or information. The plaintiff wrote always bearing the stock. His letters can be searched in vain for any commendation of it. First it was a new railroad, "The competition of which via Memphis I fear will eventually injure us badly."

Record, pp. 8 and 9.

And then the loss of the "Port Eads" and the statement:

> "This is equal to four per cent. on our stock, and in addition to this it will not be very easy now to dispose of it readily, as parties who might have bought will be fearful on account of accidents in the future."

Record, pp. 10 and 11.

And all the time, as the plaintiff himself deposes, he knew of the fine financial condition of the company and the excellent business it was doing, and, in other words, of the circumstances which made it possible a few months thereafter to pay an exceptionally large dividend, notwith-

standing the loss of the "Port Eads" and which a few weeks thereafter caused an advance in the market value of the stock $15.00 per share. There can be no question that, whether or no confidence was deserved, it was in fact reposed. If there had been no confidential relation established between plaintiff and Mrs. McKibbin it would not follow that the evidence in this case did not tend to show fraud. If the plaintiff undertook to make any representations as to the value of the stock he should have stated to Mrs. McKibbin all of the facts tending to show its value and within his knowledge. In the case of Stewart vs. Wyoming Ranch Co., 128 U. S., 383-388, Mr. Justice Gray, in delivering the opinion of the court, said:

> "In an action of deceit it is true that silence as to a material fact is not necessarily as matter of law, equivalent to a false representation, but mere silence is quite different from concealment;—*aliud est tacere, aliud celare*. A suppression of the truth may amount to a suggestion of falsehood: and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because a concealment or suppression is in effect a representation that what is disclosed is the whole truth."
>
> See Loewer vs. Harris, Administratrix, 14 U. S., App. 615, 623 and 624.

But it is contended that the plaintiff paid the market price for the stock at the time of the contract. If this were so it would still be true that his knowledge of the business and condition of the company led him to foresee that the market price must soon advance, and that the stock had an intrinsic value greater than its market value and this knowledge he did not communicate: if he had, Mrs. McKibbin would not have sold at the market price. But the rule is that it is immaterial whether he gave the full value or not. Mrs. McKibbin was entitled to know all of

the facts and then to decide whether or no she wished to sell at the market price.

A purchase by a trustee from his *cestui que trust*,

> "Although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*; unless the connection between them most satisfactorily appears to have been dissolved and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*; 'it is founded,' observes Lord Eldon, upon this, that though you may say in a particular case that the trustee has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court (by which I mean in the power of the parties) in ninety-nine cases out of a hundred, whether he has made advantage or not."

See note to Fox vs. Mackreth, White & Tudor's Leading Cases in Equity, Vol. 1, Part 1, p. 212.

Ex parte Lacy, 6 Ves. 627.

Hamilton vs. Wright, 9 Cl. & Fin. 122-3.

It is submitted in view of these principles that the second defense pleaded by appellant was well pleaded and that the evidence tended to support it.

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Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES.

MOYLAN C. FOX, AS EXECUTOR OF THE LAST WILL OF SARAH M. McKIBBIN, DECEASED, APPELLANT,

vs.

HENRY C. HAARSTICK, RESPONDENT.

BRIEF FOR RESPONDENT.

F. S. RICHARDS,
ARTHUR BROWN,
For Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

MOYLAN C. FOX, AS EXECUTOR OF THE LAST WILL OF SARAH M. McKIBBIN, DECEASED, APPELLANT,

vs.

HENRY C. HAARSTICK, RESPONDENT.

STATEMENT.

The only issue tried in the trial court below was as to the existence or non-existence of a contract. That contract was created by mutual correspondence between Sarah M. McKibbin, deceased, of Salt Lake City, and Henry C. Haarstick, of St. Louis, Mo. The parties never met individually in the negotiation, and the whole contract was made by a series of letters which are copied into the record and largely into the brief of appellant.

The real issue below was as to whether or not those letters constituted a contract in the nature of sale. That question is abandoned here by appellant. It was contended below that the letters did not make a contract. No question of practice was presented to the trial court and hardly any to the Supreme Court of Utah, from which this case is appealed. But now in this court, the only question that arises is one of practice and not any of those that were raised before the trial court or even before the Supreme Court. The question is: Whether there should not have

been definite findings upon the affirmative matter set forth in the answer. The respondent claims that the matter constituted no defense. In reply to the statement, brief, argument and specifications of appellant, we say:

First—That there is no affirmative defense of fraud alleged in the answer.

Second—That there was no evidence of fraud introduced on the trial.

Third—That the question of practice, whether there should be a finding upon the affirmative statements in the answer, is not reviewable in this court.

BRIEF.

I.

The alleged answer does not set forth any fraud whatever. No dishonesty or dishonorable act is set up. It must be remembered that this answer is a part of one that denied the existence of a contract. The record discloses (pages 2 and 3) that the amended answer was a denial of the legal effect of these letters; denied that they constituted a contract; denied that there was any contract in fact. In connection with that and as a separate and distinct defense, the defendant alleges that *prior to the date of the contract* the plaintiff agreed with Sarah M. McKibbin to act as her agent. This fact was utterly immaterial whether he had before that agreed to act as her agent or not. It was not alleged that he was acting as her agent at the time of the contract, or that his previous situation as her agent (if he was such) induced her in any way to make the contract. The relationship of Haarstick and McKibbin, as principal and agent, seems to have had no sort of connection with the sale from McKibbin to Haarstick. It is not alleged that the sale was induced or brought about by any false representations by Mr. Haarstick, or

any concealment of facts by him, or even any silence as to the facts by the respondent. So that the fraud is not alleged in terms nor are there any probative facts from which fraud could be inferred. To allege a fraud by which the sale could be set aside, a plea must contain all the affirmative matter necessary to constitute a cause of action. This plea did not contain the first essential element of affirmative matter to-wit: That there was a sale—because the defendant had denied the sale, he still denies the sale, and has always denied that there was any sale whatever or any contract of sale. So that the first affirmative matter is lacking and all the hinges and sequences that belong to it are gone. As the defendant claimed there was no sale, of course he could not claim that the sale was induced by fraud, or that it was induced by concealment, or that the sale was induced by misrepresentation, or that there was any other inducement or misrepresentation that had any effect upon the mind of Sarah M. McKibbin in making the contract.

Looking a little further we see that the matter alleged to have been concealed is utterly immaterial. It is alleged that by his writings, respondent represented that the stock was not worth the value Mrs. McKibbin placed upon it. It is nowhere alleged in this plea that in truth it was worth the value that she placed upon it. Even if such an expression of opinion could constitute a cause of action, which we deny, in order to make a cause of action for the representation, it must be shown that the representation was false. Representation is not concealment or silence. It is said that he "represented" to her that the stock was not worth the value she placed upon it. It is not alleged that it was worth the value she placed upon it. It is alleged that the company was in an extra prosperous condition, whatever that may mean. No other thing was represented in the plea as stated by Mr. Haarstick. Men do not give

$92,500 for stock unless the company is in extra prosperous condition. It is alleged that it had lately acquired a large cash reserve in its treasury and was about to declare and pay large dividends on said shares of stock and that the shares had an increased value by reason of that fact and had not depreciated in value. It is not alleged that there was any representation that they had depreciated in value. It is not alleged that they did not have a large cash reserve. No inquiry was made on that subject nor is any alleged to have been made. But the whole of the alleged fraud is based upon the broad general conclusion that the plaintiff wilfully and fraudulently concealed said fact. This loose allegation, without stating any fact or reason or logic that could operate upon the mind of McKibbin does not make an allegation of fraud. We therefore say that there is no allegation of fraud set up in the answer, and therefore, the answer being insufficient to constitute any issue on that point, no finding was necessary on that subject; and we refer to the following cases. That issue became immaterial. No findings are necessary on immaterial issues or on issues not properly pleaded.

Diffendorf vs. Hopkins, 95 Cal., 347.

In Brison vs. Brison, 90 Cal., 329, Court say:

> "When upon the trial of a cause the court renders its decision without making findings upon all the material issues presented by the pleadings, it is held that such decision can be reviewed upon a motion for a new trial. (Knight vs. Roche, 56 Cal. 15.) In such a case there has been a mistrial, and the decision, having been rendered before the case has been fully tried, is considered to have been a decision 'against law.' It will be observed, however, that this rule is only applicable in a case where the issues upon which there is no finding are 'material,' that is, where a finding upon which issues would have the effect to countervail or destroy the effect of the other findings. If a finding upon such issues would not have this effect the issues cannot be regarded as material, and the failure to make a finding thereon would not be prejudicial. (McCourt-

> ney vs. Fortune, 57 Cal. 619.) If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues which, if made, would not invalidate the judgment. If the issue presented by the answer is such that a finding upon it in favor of the defendant would not defeat the plaintiff's right of action, a failure to make such find is immaterial. (Fontaine vs. R. R. Co. 54 Cal. 654.) If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient and a failure to find upon the other does not constitute a mistrial or render the decision against law."

The claim of fraud which is set up in the answer, was not sufficient and was therefore properly disregarded, because it did not constitute any charge of fraud whatever. As a matter of fact, it was wholly disproven. Plaintiff occupied no relation whatever towards Mrs McKibbin which would prevent him from dealing with her as a stranger. The fact that he was president of the company and knew its resources and the value of its stock does not prevent him from dealing with a stockholder in the same manner as a stranger would deal.

The law on that subject is laid down in Cook on Stock and Stockholders, Secs. 320 and 350, as follows:

> "A director of the corporation itself may buy and sell its stock like any other individual. The information which he has of the affairs of the corporation, whereby he is enabled to buy or sell at an advantage over the person with whom he deals, does not affect the validity of the transaction. He is entitled to the benefit of his facilities for information. There is no confidential relation between him and the stockholder, so far as a sale of stock between them is concerned; and, so long as he remains silent and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud."

"It is not fraud for a director or other corporate officer to buy or sell stock at a profit due to his official knowledge of the condition of the corporation."

Cook on Stock & Stockholders, Secs. 320 and 350.

Gillett vs. Bowman, 23 Fed., 625.

2 Pomeroy's Equity Jurisprudence, Secs. 902-4.

Morawetz on Corporations, 565, note.

Deaderick vs. Wilson, 8 Baxter, 108.

Board of Commissioners vs. Reynolds, 44 Ind. 509.

Carpenter vs. Danforth 52 Barbour, 581.

Allen vs. Gillett, 127 U. S. 589.

The last case, Allen vs. Gillett, was not a corporation case, but arose out of the relations existing between the executor of an estate and the devisees and creditors thereof. The relationship is precisely the same. Paraphrase a clause of that opinion, as to the subject matter, and it will read as follows:

"The subject matter of the trust in this case is the whole estate of the corporation: (1) for the common benefit of all the creditors; and (2) for the common benefit of all the stockholders. Respecting these creditors and stockholders in their separate and individual capacity, the director is not the representative or guardian of their persons or property, and can exercise no legal control over either. The disposition which a single creditor may make of his debt against the corporation, or the sale or other disposition which an individual stockholder may make of his individual interest in said company, cannot interfere with the directors' control of the company for the payment of the debts of the creditors, on the one hand, or for its ultimate division among the stockholders on the other, and both are, therefore, matters entirely outside of his trust and his office."

No active fraud is pretended to exist, and none was attempted to be proven in the case.

II.

There was no evidence to sustain any allegation of fraud if one had been made. The whole of the evidence in this case consisted of the depositions of Mr. Haarstick and others. The testimony of Haarstick was the only evidence having any bearing upon this question. He testified to the various letters that had passed between the parties to constitute a contract. It is not necessary to repeat them here, because the appellant abandons the position which he took below that they do not constitute a contract. The defendant offered no evidence at all on the pretended fraud issue. True he called Mr. M. C. Fox, the executor and son-in-law, who testified that he found a slip of paper among the letters of Mr. Haarstick setting forth an account of the burning of the boat Port Eads and barges, but not a word of proof that it ever came from Mr. Haarstick. On the contrary, all the proof showed conclusively, because it was undisputed, that Mr. Haarstick did not sent it. The only evidence on that point being Mr. Haarstick's own statement found at page 13, folio 24 of the record. We quote:

> "I never mailed to Sarah M. McKibbin the printed slip hereafter referred to in the testimony of Moylan C. Fox, nor did I ever mail a similar one to the said Sarah M. McKibbin."

So there is absolutely no evidence whatever in this case tending to show any fraud.

We do not forget and will not ignore the imagination of counsel from which they deduce, that because a gentleman addresses a lady in polite language they are particular friends. Because Haarstick wrote Mrs. McKibbin as "My Dear Friend" counsel imagines a confidential relation between them. Because he told her the exact truth with regard to the "Port Eads" counsel imagines that he was suppressing some other fact. Before a party can be charged with fraud in suppressing facts there must be some fact which was suppressed. What fact was ever suppressed by

Mr. Haarstick in this correspondence with Mrs. McKibbin? What can counsel pretend was suppressed? Not a single fact that existed on the day when this negotiation closed or when Mrs. McKibbin died. In the years that have gone by counsel have never yet been able to find one single existing fact that then was known to Haarstick that he had not communicated to Mrs. McKibbin. Counsel thinks that he ought to have told what the future would bring forth in June after this sale in March. The company made money enough to declare dividends and therefore counsel has winged his argument, based his defense and theorized his reason for refusing to carry out the contract because Haarstick did not foresee and foretell and prophesy correctly all the future that was to be, and all the profits that thereafter might arise. To make the claim of fraud which counsel has so elaborately argued, stick in this case, the vendee must not only be silent to existing facts, but according to appellants' theory, he must also tell the vendor what shall happen to the value of the stock in the years to come. The record discloses that there was no fact whatever known to Haarstick on the day of this final contract that was not equally known to Mrs. McKibbin.

We call attention to this state of the record showing the absence of any facts tending to prove fraud, because it is another rule of the California Code Practice that "*no findings are necessary upon an affirmative allegation in the answer where no proof has been offered to sustain it*." None was offered here. The practice in Utah Territory is well stated in the brief of appellant. It follows that of California, Nevada and the other coast states. It is the same, word for word, so that the decisions of the courts of one state are applicable to the others. These questions of practice are determined by the decisions of California and Nevada, not by the decisions of this court. No findings are necessary upon affirmative issues tendered in the answer to which no evidence is offered by defendant.

In Himmelman vs. Henry, 84 Cal., 104, the court say:

> "The findings of the court must be sufficient to support the judgment, and must contain nothing inconsistent with it, but a failure to find upon an issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions *that evidence was submitted in relation to such issue.*"
>
> Hawes vs. Clark, 84 Cal., 275.

The principal case cited by counsel on the other side admits this rule. In the case of Heinlen vs. F. C. & I. Co., 68 Cal., 36, speaking of the failure to find upon the issues presented, the court say:

> "The defendant pleaded five years adverse diversion and appropriation; and *its evidence tended to support the plea.* The court did not find on this issue."

Wherever an issue is tendered, in any of the cases cited by counsel, there is evidence to sustain it, or else the finding is immaterial. To support our contention that the findings in this case fully cover and correspond with the issue, we refer to the following cases:

Malone vs. County of Del Norte 77 Cal. 217.

Kisling vs. Shaw, 33 Cal. 425.

Breeze vs. Doyle 19 Cal. 102.

McCourtney vs. Fortune, 57 Cal. 619.

Roberts vs. Haley 65 Cal. 402.

Knowles vs. Seale, 64 Cal. 377.

Diffendorf vs. Hopkins, 95 Cal. 346.

Brison vs. Brison, 90 Cal. 323.

Fontaine vs. S. P. R. R. Co. 54 Cal. 645-654.

III.

These questions of practice are local in their nature. Whether a finding is sufficient or insufficient depends upon the construction of the local statute. The practice having

been taken from California, the construction of the California statute is peculiarly applicable.

It is not a question of general common law or commercial law, or a Federal question or anything else that this court will review. It falls within the reasoning of the rule laid down in the case of Buena Vista County vs. I. F. & S. C. R. R. Co. 112 U. S. 177, in which the court say:

> "Other errors are assigned upon the record, relating, however, to matters of pleading and practice under the laws of the state, which, as they involve no federal question, are not proper for our consideration."

It is true that was a writ of error to the State Court. This is an appeal from a Territorial court. The limit of jurisdiction would not be the same, but the limit of construction and discretion would probably amount to the same thing. As we have shown from the discussion of the second point, to determine whether a finding is necessary or not, the court must go into the evidence; it must weigh and consider the evidence. The California authorities settle the point beyond controversy that if there is no evidence offered on the subject of fraud no finding is necessary on that subject, whatever the allegation may be. How will this court determine whether evidence was offered on that subject unless it weighs the evidence in the cause the same as a jury would. Nothing is better settled by the decisions of this court, than that it will not review or question the truth of the findings of fact made by the court below; it will not determine whether a finding is well or ill taken, whether from a Territorial or any other court. This court has adhered to this rule in considering appeals from Utah as well as from all the rest of the country. The necessity of a finding of fact upon this affirmative issue, can only be determined by examining the facts and ascertaining what they show. Counsel's argument itself is an argument on facts, and he asks you to entertain it as a jury would entertain an argument or fact, to consider

its weight and bearing, and its surroundings for the sake of lending color to his point, which is merely technical and does not reach the merits of the case.

In conclusion we have to say that the only point in this case is the purely technical one, whether a finding has been had upon probative statements contained in the answer. It is not one that affects the justice or merits of the case. We think that the decision of the court below is not erroneous and believe that it is not reviewable in this court.

Given Campbell,
ARTHUR BROWN.
F. S. RICHARDS.
For Respondent.